



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

New York (State) Reports.

REPORTS

OF

S. L. Huel

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY ABBOTT BROTHERS,

COUNSELLORS AT LAW.

VOL. XIV.

NEW YORK:

JOHN S. VOORHIES, LAW BOOKSELLER AND PUBLISHER,
20 NASSAU-STREET.

1863.

FacLib
KFN
5994
A5
v. 14

FL
S
New 71
AL 28
v. 14

[Entered, according to Act of Congress, in the year One Thousand Eight Hundred and Sixty-three, by ABBOTT BROTHERS, in the Clerk's Office of the District Court for the Southern District of New York.]

RENNIE, SHEA & LINDSAY,
STEREOTYPERS AND ELECTROTYPERS,
81, 83, and 85 Centre-street,
NEW YORK.

BAKER & GODWIN, PRINTERS,
Nassau, cor. Spruce Street.

TABLE

OF

CASES REPORTED IN VOLUME XIV.

A.		PAGE	
Ackerman <i>a. Ackerman</i>	229	Bush, Van Ness <i>a.</i>	33
Albright, People <i>on rel.</i> Martin <i>a.</i>	305	Byrnes, Fash <i>a.</i>	12
Allen, McMahon <i>a.</i>	220	C.	
Anderson <i>a. Manufacturers' Bank</i>	436	Campbell, Kelsey <i>a.</i>	368
Apple, Gasherie <i>a.</i>	64	Campbell, Morton <i>a.</i>	410
B.		Carman <i>a. Mayor, &c., of N. Y.</i> ..	301
Bache, Betts <i>a.</i>	279	Carter <i>a. Koezley</i>	147
Baldwin, Taylor <i>a.</i>	166	Cary, Norton <i>a.</i>	364
Barker <i>a. Wheeler</i>	170	Case of Hay	53
Bean, Coleman <i>a.</i>	38	—— Mather	45
Bellows, Purchase <i>a.</i>	357	Cavanagh, Matter of	258
Betts <i>a. Bache</i>	279	Chamberlain <i>a. Dempsey</i>	241
Bingham <i>a. Disbrow</i>	251	Chamberlain, Harper <i>a.</i>	408
Birbeck <i>a. Stafford</i>	285	Chapman, Field <i>a.</i>	133
Board of Police, People <i>on rel.</i> Han-		Chesley, Wheeler <i>a.</i>	441
rahan <i>a.</i>	151	Clark <i>a. Clark</i>	299
Board of Police, People <i>on rel.</i>		Coe <i>a. Coe</i>	86
Peck <i>a.</i>	158	Coleman <i>a. Bean</i>	38
Bortle <i>a. Mellen</i>	228	Coley's Estate	461
Boucher <i>a. Pia</i>	1	Conger, Johnson <i>a.</i>	195
Brown <i>a. Hermann</i>	394	Cook <i>a. Kelly</i>	466
Brownson, People <i>on rel., a. Marine</i>		Corning <i>a. Glenville Woollen Co.</i>	339
Court of N. Y.	266	County, Marshall <i>a.</i>	237
Brush <i>a. Kohn</i>	51	Cowenhoven, Peet <i>a.</i>	56
Buchanan, Von Schoening <i>a.</i>	185, 468	Crockett <i>a. Smith</i>	62
		Cronnse <i>a. Fitch</i>	346

	PAGE		PAGE
D.		Hubbard <i>a. N. Y. & Harlem R. R. Co.</i>	275
Danvers <i>a. Dorrity</i>	206	Hunter, Spicer <i>a.</i>	4
Davis <i>a. Hackley</i>(note)	64	I.	
Decker, Jones <i>a.</i>	391	International Life Assurance Co. <i>a.</i>	
Dempsey, Chamberlain <i>a.</i>	241	Sweetland.....	240
Disbrow, Bingham <i>a.</i>	251	J.	
Dorrity, Danvers <i>a.</i>	206	Jarvis <i>a. Felch</i>	46
E.		Jarvis, Summers <i>a.</i>(note)	322
Estate of Coley.....	461	Johnson <i>a. Conger</i>	195
F.		Johnson, People <i>on rel. Reilly a.</i> ..	416
Fairchild <i>a. Gwynne</i>	121	Johnson <i>a. Smith</i>	421
Fash <i>a. Byrnes</i>	12	Jones <i>a. Decker</i>	391
Fassett <i>a. Tallmadge</i>	188	Joseph, Whitlock <i>a.</i>	342
Felch, Jarvis <i>a.</i>	46	K.	
Ferguson, Wait <i>a.</i>	379	Kane, People <i>a.</i>	15
Ferner <i>a. Williams</i>	215	Keilback, McGay <i>a.</i>	142
Field <i>a. Chapman</i>	133	Kelly, Cook <i>a.</i>	466
Fielden <i>a. Lahens</i>	48	Kelsey <i>a. Campbell</i>	368
Fitch, Cronnse <i>a.</i>	346	Kelsey, People <i>on rel. Ward a.</i> ...	372
Freeman <i>a. Fulton Fire Ins. Co.</i> ..	398	Kelsey, Ward <i>a.</i>	107
Fulton Fire Ins. Co., Freeman <i>a.</i> ..	398	Kennedy, Hart <i>a.</i>	432
G.		Koezley, Carter <i>a.</i>	147
Gasherie <i>a. Apple</i>	64	Kohn, Brush <i>a.</i>	51
Gilman <i>a. Oliver</i>	174	L.	
Glenville Woollen Co., Corning <i>a.</i>	339	Lahens, Fielden <i>a.</i>	48
Graydon, Low <i>a.</i>	443	Lansing <i>a. Stone</i>	199
Gwynne, Fairchild <i>a.</i>	121	Lawrence, Mowbray <i>a.</i>	160
H.		Lawson, Springsteed <i>a.</i>	328
Hackley, Davis <i>a.</i>(note)	64	Leach, Mallory <i>a.</i>(note)	449
Hanrahan, People <i>on rel. Board of Police a.</i>	158	Loomis, Meech <i>a.</i>	428
Harper <i>a. Chamberlain</i>	408	Low <i>a. Graydon</i>	443
Hart <i>a. Kennedy</i>	432	Lyon <i>a. Sherman</i>	393
Hart, Shearman <i>a.</i>	358	M.	
Hawkins, Schiefflin <i>a.</i>	112	McClelland <i>a. Remsen</i>	331
Hay's Case.....	53	McGay <i>a. Keilback</i>	142
Hermann, Brown <i>a.</i>	394	McMahon <i>a. Allen</i>	220
Hoffman, Rock River Bank <i>a.</i>	72	Mallory <i>a. Leach</i>(note)	449
Hoffman <i>a. Van Nostrand</i>	336	Manhattan Oil Co. <i>a. Thorn</i> .(note)	291
Holsman, Wetmore <i>a.</i>	311	Manufacturers' Bank, Anderson <i>a.</i>	436
Hotaling <i>a. Marsh</i>	161	Marine Court of N. Y., People <i>on rel. Brownson a.</i>	266

	PAGE		PAGE
Stewart <i>a. Smith</i>	75	Von Schoening <i>a. Buchanan</i> .	185 468
Stone, Lansing <i>a.</i>	199		
Stout, Platt <i>a.</i>	178	W.	
Stuart <i>a. Salhinger</i>	291	Wait <i>a. Ferguson</i>	379
Summers <i>a. Jarvis</i>	(note) 322	Wall <i>a. Thorn</i>	(note) 292
Sweetland, International Life As-		Walsh, Morris <i>a.</i>	387
surance Co. <i>a.</i>	240	Ward <i>a. Kelsey</i>	107
		Ward, People <i>on rel. Kelsey a.</i> .	372
T.		Warrin, Newbould <i>a.</i>	80
Tallmadge, Fassett <i>a.</i>	188	Webb, Mechanics' Bank <i>a.</i> .	(note) 72
Taylor <i>a. Baldwin</i>	166	Wetmore <i>a. Holsman</i>	311
Thorn, Manhattan Oil Co. <i>a.</i> (note)	291	Wheeler, Barker <i>a.</i>	170
Thorn, Wall <i>a.</i>	(note) 292	Wheeler <i>a. Chesley</i>	441
Townsend <i>a. Newell</i>	340	Wheeler <i>a. Wright</i>	353
		Whitlock <i>a. Joseph</i>	342
V.		Willet, Porter <i>a.</i>	319
Van Ness <i>a. Bush</i>	33	Willet, Persse & Brooks Paper	
Van Nostrand, Hoffman <i>a.</i>	336	Works <i>a.</i>	119
Van Vaughner, Sarsfield <i>a.</i>	297	Williams, Ferner <i>a.</i>	215
Van Wart <i>a. Price</i>	(note) 4	Williams, Scott <i>a.</i>	70
		Wright, Wheeler <i>a.</i>	353

INDEX

TO THE

CASES REPORTED IN VOLUME XIV.

A.

	PAGE
<i>Abatement</i> —by death of sole plaintiff	46
<i>Acknowledgment</i> —of assignment for benefit of creditors, proof by witness not sufficient, instead of	466
<i>Action</i> —lies to compel the renewal of a lease, pursuant to covenant	195
<i>Actions</i> ,—Several, for the same cause not allowed	206
<i>Affidavit</i> —to found summary proceedings to recover possession of lands, must show a tenancy	457
<i>Affidavits</i> —Admissibility of, on motion for injunction	note, 64
— Admissibility of, on motion for attachment	64
— Admissibility of, on motion to discharge arrest	74
— on motion; opposing affidavits; new matter; conflict of testimony	358
<i>Allowances</i> —in equitable cases, when may be granted, and how	161
<i>Amendment</i> —of pleadings, at the trial, liberally allowed	38
— after judgment cannot be made to correct a judicial error, or grant additional relief	161
— of verdict in action for chattels, by inserting nominal damages	185
— the court may allow exceptions to be served after the time fixed has expired	228
— of summons allowed, in answer to motion to dismiss the complaint for departing from it	364
— leave to answer anew, not waived by appearing on the trial	443
<i>Ancillary administration</i> —powers and liability of representative	461
<i>Another action pending</i> —for partition, a bar to a new action	206
<i>Answer</i> —to action on note averring indorsement "to John Doe" not frivolous	262
<i>Appeal</i> —Court of, cannot review amendments granted at the trial	33
— Objection not taken below is not available on	75
— from judgment on report of referee of claim against estate of decedent	86
— decisions of a judge on conflicting evidence are conclusive	109
— must be dismissed if the case contains no findings of fact by the court, when the trial was without a jury, unless the parties consent to send it back	209
— to referees from determination of highway officers, how taken and heard	305
— in Marine Court, how taken, and within what time, case, &c., to be made	342
— when not effectual, no bar to a new appeal	368
— from the City Court of Brooklyn to the Supreme Court, ineffectual without security for costs	391

	PAGE
<i>Appearance</i> —in supplementary proceedings, though voluntary, gives jurisdiction.	251
<i>Arbitration</i> —Agreement to submit to, when may be specifically enforced.	195
<i>Arrest</i> —remedy upon the undertaking, after discontinuance.	62
—— On motion to vacate, contemporaneous frauds may be proved in opposition	70
—— Motion to vacate, must be made before judgment	170
—— Grantee on fraudulent conveyance not liable to, in action to set the conveyance aside	188
—— Order of, necessary to entitle plaintiff to execution against the person, unless complaint shows ground of arrest.	357
—— Discharge from, by consent, does not preclude execution against the person	428
—— Exemption from, of police officers.	432
—— the fact that complaint demands cost of protest upon a check given in payment of money received in a fiduciary capacity; or the fact that the creditor has received his debtor's note;—no bar to an arrest.	449
—— not authorized in action on a judgment for tort, nor in action for fraud. <i>note</i> ,	449
<i>Assessment sale</i> —Irregularity in, a ground of enjoining execution of lease.	209
<i>Assessments</i> —in the city of New York—what is ground for vacating.	53
<i>Assignability</i> —of sheriff's claim for fees	285
<i>Assignee</i> —for benefit of creditors not deemed a purchaser for value, but is subject to set-off.	112
<i>Assignment</i> —if fraudulent in fact, is ground for attachment	109
—— by delivery, of negotiable instrument, payable in blank	275
—— to a creditor, not invalidated by a provision for repayment of surplus to the assignor	331
—— for benefit of creditors, effect of omission to acknowledge, &c.	121
—— for benefit of creditors, under act of 1860, must be acknowledged by each assignor	466
<i>Attachment</i> —against property of debtor who threatens to assign	64
—— Motion to vacate, after assignment.	64
—— supplementary affidavits on the part of plaintiff.	64
—— may issue on the ground that the debtor's assignment, though not invalid on its face, is fraudulent in fact	109
—— in justice's court, Copy of, with inventory, must be served on defendant, unless he is shown to be a non-resident.	237
—— the justice's certificate is conclusive as to fees of sheriff	285
<i>Attorney</i> —liable for sheriff's fees	285
—— not to be removed without payment of his costs.	336
<i>Attorney's lien</i> —extends to his whole services, and binds the whole judgment.	229
—— how enforced.	229

B.

<i>Bail</i> —should not, in general, be required from public officer, except to nominal amount.	432
<i>Banking</i> —act to restrain unauthorized banking, not applicable to obligations not payable on demand.	275
<i>Bond</i> —of prisoner in contempt, must have two sureties.	410
<i>Burden of proof</i> —on motion.	358

C.

<i>Calendar</i> —Order of causes on, not to be fixed at special term	223
<i>Cancellation of instruments</i> —on the ground of mistake	311
<i>Case</i> —Settlement of, is a judicial act.	43
—— necessary to review misdirection as to verdict.	51
<i>Cause of action</i> —to set aside several fraudulent conveyances, is single.	80

<i>Cause of action</i> —to recover fees of office, wrongfully exercised by defendant, is assignable	178
— for act of servant of defendant in ignorantly trespassing on plaintiff's land	301
— for cancellation of a deed on the ground of mistake	811
— judgment is deemed a contract. note, 449	
<i>Certiorari</i> —to remove cause from New York Sessions to Supreme Court, not allowed	note, 105
— Summary proceedings not reversed on, upon ground of harshness or want of actual notice	457
<i>Charge</i> —in action for breach of warranty in the sale of a horse	323
<i>Chose in action</i> —Action to recover contents of what is	436
<i>City Court of Brooklyn</i> —Appeal from, to the Supreme Court, ineffectual without security for costs	331
<i>Clerk</i> —Acts of, bind attorney who employs him	285
<i>Common law</i> —of England, how far in force in this State	199
<i>Complaint</i> —on negotiable instrument may aver conditions of demand, &c., generally, under section 162 of the Code	215
— in action to recover bet, may be in the form prescribed by the statute for a declaration	279
— Form of, in action on negotiable instrument payable in blank	275
— to be dismissed in cases of an equitable nature, where the amount does not exceed \$50	297
— for injury to plaintiff's land by defendant's servant	301
— in action on insurance policy, must aver plaintiff's interest	398
<i>Confession of judgment</i> —for money lent, Form of	393
<i>Consent</i> —to discharge from arrest, does not preclude the issue of execution against the person	428
<i>Consul</i> —Privilege of	72
<i>Contempt</i> —Denial of answers to interrogatories	130
— in suing receiver without leave	166
— may be punished without attachment or interrogatories	166
— Disobedience of judgment for payment of money, is not	188
— in refusing to execute a conveyance required by a judgment	387
<i>Corporation</i> —Nature and extent of stockholders' and officers' liability for debts of	379
<i>Costs</i> —of motion pending, cannot be determined on application for judgment.	62
— the power of the court to grant allowances out of funds in court in equitable causes	161
— do not include stenographer's fees	174
— What, should be imposed on granting a new trial	223
— within what time to be collected	223
— in action for chattels, where plaintiff recovers but a part	319
— on mandamus, not matter of appeal	305
— in action for chattels, where plaintiff recovers but a part. note, 322	
— must be paid before substitution of attorneys will be granted	336
— liability of real party in interest for costs recovered against nominal plaintiff	353
— where there are several defendants not united in interest	408
<i>Court of Appeals</i> —will not look beyond the findings of fact	75
<i>Court of Sessions</i> —in the city of New York	note, 105
<i>Covenant</i> —to renew lease at a rent to be fixed, may be specifically enforced	195
<i>Creditor</i> —though without judgment, may attach debtor's property, on the ground that he has made a fraudulent assignment	109
<i>Creditor's action</i> —Third person who has conveyed, not a necessary party in	4
— to set aside several conveyances, shows but one cause of action	80
— may be sustained against joint-debtors, on a judgment recovered on service upon one or more	133
— execution, when to be returned	133

	PAGE
<i>Creditor's action</i> —rights of creditor no better than those of his debtor's assignee. . .	142
—— creditor cannot impeach assignment of a mere contingency.	142

D.

<i>Death</i> —of sole plaintiff abates action.	46
<i>Debtor</i> —Threats of, to assign, show fraud.	64
<i>Decision</i> —of the court must contain findings of fact in order to sustain appeal. . .	209
—— of a judge upon a trial without jury must declare the relief appropriate. . .	241
<i>Default</i> —after death of sole plaintiff, is irregular.	46
<i>Demand</i> —of execution of conveyance, served before tendering it for execution, sufficient.	887
<i>Demurrer</i> —for defect of parties cannot be taken by one not prejudiced by the defect.	80
—— having been sustained, a receiver cannot be appointed.	160
—— to answer does not lie because a mere defence is pleaded as a counter-claim. . .	379
<i>Departure</i> —of complaint from summons.	364
<i>Disbursements</i> —stenographer's fees not taxable.	174
<i>Discharge</i> —from imprisonment, Application for, under 2 Rev. Stat., 31, how made. .	45
—— Validity of, not to be tried on affidavits.	291
<i>Discontinuance</i> —on payment of costs, when allowed after arrest.	62
—— not allowed at special term, after order of general term requiring payment of costs, until such costs are paid.	228
<i>Discovery and inspection</i> —in what cases allowed, instead of requiring the party to resort to a subpoena duces tecum.	443
—— what is sufficient description of the documents sought.	443
<i>Dismissal of complaint</i> —after death of plaintiff, is irregular.	46
—— in equity causes where the amount does not exceed \$50.	297

E.

<i>Election</i> —between causes of action, is conclusive.	328
<i>English statute</i> —as to accidental fires, is in force in this State.	199
<i>Enlarging time</i> —to serve exceptions.	228
<i>Escape</i> —Releasing prisoner from attachment for contempt, on his giving bond with only one surety, is.	410
<i>Estoppel</i> —refusal to pay because of inability, no estoppel as to validity of demand. .	83
<i>Evidence</i> —of promise of marriage and of character, on an indictment for seduction. .	15
—— Parol, to vary writing, not admissible.	56
—— in an action against one for accidentally setting fire to a building.	199
—— in action for breach of warranty in the sale of a horse.	328
—— declarations when admissible as to payment, &c.	346
—— opinion or understanding of witness as to intention or effect of a transaction. .	346
—— of value at a different time.	346
—— testimony of a party opposing that of his adversary should be corroborated. .	358
—— A former judgment is not, as to a point not in issue.	416
<i>Exception</i> —to mixed finding of law and fact does not raise objection to sufficiency of evidence.	305
—— to omission to find a fact, unavailing.	305
—— to ambiguous portion of charge.	328
<i>Execution</i> —Omission to deduct payment made on judgment does not avoid. . . .	56
—— when to be returned to sustain creditor's action.	133
—— issued after satisfaction of judgment, irregular.	229
—— may be allowed to stand to abide trial of issues as to validity of insolvent's discharge.	291
—— against the person, when may be issued.	357

	PAGE
<i>Execution</i> —not set aside if discharge appears void.	291
— against the person, may issue, although plaintiff consented to defendant's discharge from arrest, pending the action.	423
<i>Executor</i> —effect of taking ancillary letters in this State.	401
— appointed after probate, in a sister State, may dispose of assets here without ancillary letters.	note, 402
<i>Executors and administrators</i> —Judgment, how entered, on a report on reference of claim against.	86

F.

<i>Final judgment</i> —What is.	220
<i>Foreclosure</i> —decision of judge, on trial of issues, must provide the relief.	241
<i>Foreign corporation</i> —obligation to give security for costs, not a condition precedent to suit.	119
— having place of business here, is, nevertheless, not deemed a resident.	240
<i>Foreign executor</i> —not liable to account here as to assets not inventoried.	461
<i>Foreign judgment</i> —merges original cause of action.	note, 449
<i>Form of complaint</i> —against indorsers, &c., of negotiable paper.	215
— for injury to plaintiff's land by defendant's servant.	301
<i>Former adjudication</i> —not evidence on a point not in issue.	416
<i>Fraud</i> —of third person no evidence against plaintiff.	88
— contemporaneous, may be proved to sustain order of arrest.	70
— Action for, is not always one in which defendant may be arrested.	note, 449
<i>Fraudulent assignment</i> —threats to assign.	64
<i>Fraudulent conveyance</i> —Agreement of purchaser, at judicial sale, to leave debtor in possession, is not.	4
— grantee not liable to arrest.	188

G.

<i>General Sessions of N. Y.</i> —has power to grant new trial.	91
--	----

H.

<i>Highway proceedings</i> —Practice in.	805
---	-----

I.

<i>Imprisoned debtor</i> —liable to service of process, and punishment for contempt.	387
<i>Imprisonment</i> —Application for discharge from, under 2 Rev. Stat., § 1.	45
<i>Infant plaintiff</i> —in partition, must obtain leave to sue, and next friend must give security.	299
<i>Injunction</i> —Admissibility of affidavits on motion for.	note, 64
— not to issue if there is other remedy, nor to compel an act to be done.	107
— allowed to restrain municipal corporation from making lease upon irregular sale for assessments.	209
— to restrain breach of agreement in restraint of trade.	358
<i>Insurance</i> —wager policies are void at common law.	398
<i>Irregularity</i> —in assessment, what is ground for vacating.	53
— Motion against, must be promptly made.	119
<i>Irregularities</i> —not specified in motion papers, not available on appeal.	449

J.

<i>Joinder of actions</i> —breach of warranty and fraud not to be united.	328
<i>Joinder of parties</i> —in creditor's action to set aside several conveyances.	80

	PAGE
<i>Joint-debtors</i> —Judgment against, on service of a part, will sustain creditor's action against all.....	133
— in action in justice's court, mode of proceeding against debtor not served.....	421
<i>Joint judgment-debtor</i> —form of summons to show cause why he should not be bound.....	340
<i>Judge at chambers</i> —no jurisdiction of application for discharge from imprisonment under 2 Rev. Stat., 31.....	45
<i>Judgment</i> —A discontinuance is.....	62
— What, may be entered, on report of reference of claim, against estate of decedent.....	86
— against joint-debtors on service on a part, will sustain a creditor's action..	133
— cannot be amended to grant additional relief.....	161
— cannot be entered on a trial by the court, except pursuant to the decision filed by the judge.....	241
— directing defendant to execute conveyance, how enforced.....	387
— Recital in, as to a matter not in issue, is not evidence.....	416
— how far merges original cause of action.....	note, 449
— creditor—not liable for costs recovered against a receiver appointed for his benefit.....	353
<i>Judicial sale</i> —agreement of purchaser to leave debtor in possession is a mortgage	4
— Purchaser at, not to be compelled to take a title involving a doubtful question of law.....	253
<i>Jurisdiction</i> —of suits where a consul is defendant.....	72
— where a minister to a foreign country is defendant.....	note, 72
— of Supreme Court in equitable actions for less than \$50.....	297
— Limit of, as to amount, how affected by plaintiff's voluntary reduction of his claim.....	266
— Order merely unauthorized, not wholly void for want of.....	251
— of United States courts where the assignor is plaintiff, but the assignee is not a citizen of the same State as the defendant.....	436
<i>Juror</i> —Act of, in communicating the verdict before it is announced, not ground for setting it aside.....	12
<i>Justice's court</i> —Attachment in, how served, and requisites of return.....	237
— After judgment in, against joint-debtors, on service of one, a new action may be brought against the other.....	421

L.

<i>Landlord</i> —of wharf may dispossess tenant.....	372
<i>Lease</i> —of wharf, What is.....	372
<i>Leave to answer anew</i> —not waived by appearing on the trial.....	443
<i>Letters-testamentary</i> —Ancillary, when necessary to be obtained by foreign executor.....	note, 462
<i>Limitations</i> —Statute of, when applicable to pre-existing demands.....	75

M.

<i>Mandamus</i> —effect of general verdict on several issues.....	151, 158
— peremptory writ, when awarded.....	151, 158
<i>Marine Court</i> —Appeal in, time to make case, &c.....	342
— of New York, Jurisdiction of, as affected by the amount sued for.....	266
<i>Married woman</i> —not liable on a contract, unless made in the course of a business or trade carried on by her.....	394
<i>Master</i> —liable for ignorant act of servant.....	301
<i>Metropolitan police officers</i> —how far exempt from arrest, &c.....	432
— power of commissioners to make rules.....	432

	PAGE
<i>Motion</i> —Decision of, conclusive.....	56
—— to vacate attachment, may be made after the moving party has assigned...	64
—— supplementary affidavits on the part of the plaintiff.....	64
—— for injunction, Admissibility of affidavits on.....	note, 64
—— to vacate provisional remedy, on the ground of fraud, may be opposed by proof of other contemporaneous frauds.....	70
—— to dismiss action against consul is not answered by subsequent revocation of his <i>exequatur</i>	72
—— against irregularity must be promptly made.....	119
—— to vacate order of arrest cannot be made after judgment.....	170
—— Validity of insolvent's discharge not to be determined on.....	291
—— opposing and rebutting affidavits; new matter; burden of proof.....	358
—— validity of discharge not tried on motion.....	291
—— to vacate arrest not to be granted by another judge on mere expediency....	432
—— irregularities not specified in motion-papers, not available on appeal.....	449

N.

<i>New trial</i> —not to be granted for juror's communicating the verdict.....	12
—— may be granted by General Sessions of New York.....	91
—— What costs should be imposed on granting.....	223
<i>New York city</i> —what is legal irregularity in assessments.....	53
<i>New York city General Sessions</i> —has power to grant new trial.....	91
—— history of the court.....	91
<i>Next friend</i> —for infant plaintiff, in partition, must give security.....	299
<i>Nominal plaintiff</i> —cannot substitute attorney, except on his costs being paid by real party in interest.....	336

O.

<i>Office</i> —Title to, how pleaded.....	147, 173
<i>Officer</i> —may recover fees which another claimant of the office has received.....	173
—— Public, should not, in general, be held to bail except in nominal sum.....	432
<i>Order</i> —Omission to enter, does not render the decision less conclusive on the successful party.....	56

P.

<i>Parties</i> —one who took a conveyance for the benefit of a debtor, and conveyed pursuant to the trust, not a necessary party to a creditor's action.....	4
—— in action to recover plaintiff's share of an award to unknown owners, which had been collected by defendant.....	note, 4
—— jurisdiction of suits where a consul or minister is a defendant.....	72
<i>Partition</i> —Action for, to be dismissed if another action is pending, involving the same controversy.....	206
—— by petition, whether abolished or not.....	253
—— by infant plaintiff, cannot be commenced without leave of court.....	299
<i>Partner</i> —Authority of, to assign for the benefit of creditors.....	331
<i>Place of trial</i> —in action by foreign corporation.....	240
<i>Pleading</i> —title to office; decision of officer of limited jurisdiction.....	147
—— title to public office.....	173
—— the performance of conditions precedent, may be by general averment under the Code.....	215
—— in action to recover bet, &c.....	279
—— not to be struck out as frivolous unless clearly bad.....	262
—— every fact essential at common law, to make out the case, must be averred, unless dispensed with by statute.....	393

<i>Prohibition</i> —Writ of, the proper remedy to restrain a judicial officer	107
—— In what cases the writ of, may issue	266

R.

<i>Railroad bonds</i> —payable in blank, assignable by delivery	275
—— Form of complaint on	275
<i>Real party in interest</i> —Who is, as such, liable for costs	353
<i>Receiver</i> —not to be appointed after demurrer has been sustained	160
—— not to be sued without leave	166
—— appointed to hold till final decree, continues until decision of appeal from order for new trial	220
—— in supplementary proceedings, may be appointed though the debtor's appearance was voluntary	251
<i>Referee</i> —to take testimony should not exclude for incompetency	70
—— two referees, in the absence of the third, cannot settle case	43
<i>Reference</i> —of claim against estate of deceased person, judgment upon report, how entered	86
—— to compute amount due in foreclosure-cases tried by the court, not proper unless directed by the decision	241
<i>Religious corporation</i> —application for sale of real estate to be by trustees, not necessarily by the corporators	424
<i>Removal of causes</i> —not granted in doubtful cases	436
<i>Replevin</i> —how far affected by the Code	319
<i>Rule</i> —which has been abrogated by statute, is revived by repeal of statute	297

S.

<i>Satisfaction</i> —of judgment, though against the attorney's rights, cannot be disregarded by him	220
<i>Security for costs</i> —motion when in season	1
—— additional to undertaking for delivery, &c., of chattels	1
—— new sureties not required because of insolvency of original	1
—— when required from a foreign corporation	119
—— necessary on an appeal from the City Court of Brooklyn to the Supreme Court	391
<i>Seduction</i> —under promise of marriage, Evidence on an indictment for	15
<i>Service</i> —of order, how made to bring party into contempt	180
—— of justice's attachment, on third person, in what cases may be made	237
<i>Set-off</i> —Right to, in cases of mutual dealings	112
<i>Sheriff</i> —not liable for taking bond with only one surety, where the plaintiff has procured the bond to be assigned, and obtained leave to issue alias attachment	410
<i>Sheriff's fees</i> —may be collected from the attorney	285
<i>Special proceedings</i> —to authorize sale of real estate of religious corporations to be by trustees, not necessarily by the corporators	424
<i>Specific performance</i> —may be adjudged of a covenant to renew a lease	195
<i>Statutes</i> —Interpretation of, as to directory and imperative provisions	121
<i>Stay of proceedings</i> —on appeal, if not effectual, does not prevent a new appeal and a new stay	363
<i>Stockholders</i> —of corporation not liable for its debts to a creditor who was also a stockholder	379
<i>Subrogation</i> —not allowed, to indemnity taken by a wrongdoer	142
<i>Substitution</i> —of attorneys granted only on payment of the costs due the attorney to be removed	386
<i>Summary proceedings</i> —to obtain possession of land, not to be enjoined except in case of fraud	107

<i>Summary Proceedings</i> —to recover possession of lands. Tenant estopped from denying title. Landlord's breach of covenant no defence. Magistrate may charge jury.....	372
—— harshness and oppressive practice, and probable want of actual notice to defendant, not ground for reversal.....	457
—— requisites of affidavit to found such proceedings.....	457
<i>Summons</i> —to require joint-debtor in a judgment to show cause why he should not be bound.....	340
—— when to be for relief, and when for a specified sum.....	364
<i>Supplementary proceedings</i> —the residence of the defendant, intended by section 292 of the Code, is his residence at the time of issuing execution.....	251
—— the residence of the judge is immaterial, but the place of examination is fixed by the statute.....	251
—— a stranger claiming a prior lien not entitled to be made a party.....	339
<i>Sureties</i> —Insolvency of, in bond for costs, no ground for requiring new sureties..	1
—— in an undertaking, estopped by its recitals.....	88

T.

<i>Trial</i> —question as to any fact material to the issue, or to the benefit of the party, how to be answered.....	83
—— misdirection as to verdict must be reviewed by a case.....	51
—— improper exclusion of evidence cured by its subsequent admission.....	346
—— a party cross-examining as to new matter cannot contradict the testimony.....	346
—— <i>by jury</i> —involves power of magistrate to charge them.....	372

U.

<i>Undertaking</i> —Recitals in, are conclusive against the sureties.....	88
<i>Urry</i> —when may be interposed by a purchaser against a mortgage.....	241

V.

<i>Verdict</i> —general, on several issues in mandamus cases, Effect of.....	151, 158
—— in action for chattels, omission how supplied.....	185
<i>Verification</i> —when may be by attorney, and requisites of.....	440, 441

W.

<i>Waiver</i> —of notice equivalent to notice.....	805
—— of right of action against a sheriff on an escape.....	410
—— proceeding in the cause does not waive a substantial right.....	443
<i>Wharf</i> —is a tenement, and tenant may be dispossessed.....	372
<i>Witness</i> —how impeached: his right to explain.....	83
—— Relator in mandamus is competent.....	805

ABBOTTS' PRACTICE REPORTS.

NEW YORK.

BOUCHER *a. PIA.*

*New York Superior Court; General Term, October, 1861.
Again, At Chambers, January, 1862.*

SECURITY FOR COSTS.—LACHES.—RENEWAL OF BOND ON INSOL- VENCY OF SURETIES.

Where the defendant moved for security for costs, on the third day after he first ascertained that the plaintiff was not a resident within the jurisdiction of the court,—*Held*, that laches could not be imputed to him.

In an action to recover judgment for the possession of personal property, where the plaintiff had filed an undertaking in the form prescribed in section 209 of the Code, to obtain the immediate delivery of the property; and the plaintiff was a non-resident,—*Held*, that under 2 Rev. Stat., 620, § 4, the defendant was entitled to have, in addition to the undertaking, security for costs, in the form of a bond, in the penalty of \$250.

Where a non-resident plaintiff has given security for costs under 2 Rev. Stat., 620, § 4, and the sureties become insolvent, the court has no authority to require new or further security to be given.*

I. Appeal from an order requiring the plaintiff, a non-resident, to file security for costs.

This was an action to obtain the delivery of certain personal property, valued at \$150. The plaintiff had obtained the de-

* Compare *The Slater Bank a. Sturdy*, 31 *Ante*, 224.

Boucher *a. Pia.*

livery of the property as a provisional remedy under the Code, upon an undertaking, in the sum of \$300, as prescribed in section 209 of the Code. The issues joined in the cause were referred to Michael Ulshoeffer, Esq. On the trial it appeared that the plaintiff was a non-resident. The defendant, within a few days thereafter, moved to compel the plaintiff to file security for costs. The motion was granted, and the plaintiff, pursuant to special leave obtained, appealed to the general term.

Orson A. House, for the appellant.

Edmund Yenni, for the respondent.—I. The plaintiff is compelled to file security for costs, under the statute. (See *Gelch a. Barnaby*, 7 *Abbotts' Pr.*, 19; 1 *Bosw.*, 657.) The provisions of the Revised Statutes, requiring security for costs, are not abrogated by the Code.

II. The defendant is entitled to security for costs in the sum of \$250 by statute, and in all cases this amount must be over and above the undertaking for any value of personal property claimed in the action. In this action the value of the property is \$150, and the undertaking given is only for \$300, showing clearly that the defendant is entitled to a further bond.

BY THE COURT.*—BOSWORTH, C. J.—On the 8th of July, 1861, the defendant was first informed that the plaintiff was a non-resident. On the 11th of July, he obtained an order that security for costs be filed in ten days after the service of that order; or that cause be shown on the 19th of that month. On the 23d, after cause had been shown, the order appealed from was made. That order requires security for costs to be filed, and stays plaintiff's proceedings in the mean time. The defendant was not guilty of laches in not making his motion sooner, and there is nothing to indicate that it was made merely for delay. In *Rolinson a. Sinclair* (1 *Den.*, 628), the order was moved for merely for delay; the defendant moved in July, 1845, and there was no pretence that he did not know in the previous December, when the suit was commenced, that the plaintiff was a non-resident. In *Florence a. Bulkley* (1 *Duer*, 705), the defend-

* Present, BOSWORTH, Ch. J., WOODRUFF, ROBERTSON, and WHITE, JJ.

ant had been guilty of laches. In the case before us, laches cannot be imputed to the defendant.

The defendant is entitled to security for costs in the form of a bond in the penalty of \$250. What is the amount of the undertaking given on bringing the suit does not appear; it is not shown to have been \$250. It does not appear, therefore, that the defendant has security in any form in the sum of \$250, for both the costs of the action and the return of the property taken. The security given, not being a sealed instrument, will outlaw in six years after a cause of action accrues against the surety. (*Code*, § 91.) Upon a bond, the liability will continue twenty years. (*Id.*, § 90.)

In *Rogers v. Hitchcock*, a bond had been given, but for what amount is not stated. (9 *Wend.*, 462.)

The defendant could not maintain an action on a bond given under 2 Rev. Stat., 523, § 7, subd. 2, unless he recovered judgment in the action. The terms of the bond required by 2 Rev. Stat., 620, § 4, are broad enough to secure the payment of any interlocutory costs that may accrue.

But whether such costs are recoverable or not, we think the order is free from error, and should be affirmed.

II. Motion to compel the plaintiff, a non-resident, to file security for costs.

The plaintiff filed security for costs after the foregoing decision of the general term; and the sureties, upon exception, justified in the manner required by statute. The defendant now moved to compel the plaintiff to file further security, on the ground that the surety in the previous bond had become insolvent.

Edmund Yenni, for the motion.

Orson A. House, opposed.

MONELL, J.—The moving papers make out a clear case of insolvency, and there is no attempt on the part of the plaintiff to disprove it. If, therefore, I could find any power in the court to grant the relief the defendant asks, I should unhesitatingly give it. But the statute, which requires security for

Spicer *a.* Hunter.

costs in certain cases, contains no provision which authorizes the court to compel the filing of a second bond, upon the sureties in the first becoming insolvent. In an analogous case, that of a foreign corporation suing in our court, the N. Y. Common Pleas held, at general term, that there was no such power. (Hartford Quarry Co. *a.* Pendleton, 4 *Abbotts' Pr.*, 460.) Provision is made by law (*Code*, § 335) for new security on appeal, where the sureties have become insolvent. Without this provision, or before it became a part of the Code, the court had no power to compel further or other security. (Bettshoven *a.* Wheaton, cited by HOFFMAN, J., in Willett *a.* Stringer, 15 *How. Pr.*, 310.) It is to be regretted there should be an absence of power to authorize the court to compel further security in these cases; but the fault lies with the Legislature, and not with the courts. The latter must administer, not make the law.

Motion denied, but without costs.

SPICER *a.* HUNTER.

Supreme Court, Second District; Special Term, Sept., 1861.

FRAUDULENT CONVEYANCE.—PROPER PARTIES.

Where the purchaser of land at a foreclosure-sale, on receiving arrears of interest, with costs, and expenses of foreclosure, allowed the defendant to continue in possession, under a parol agreement that the defendant should occupy the land so long as he paid taxes, assessments, and interest on the mortgage debt; —*Held*, that the purchaser had at least a valid lien upon the land, which would pass by grant, and which could not be impeached by a subsequent creditor of the defendant in the foreclosure.

In an action by a creditor to avoid a conveyance, one who innocently accepted a deed of the property for the benefit of the alleged fraudulent grantee, and who has conveyed in accordance with the trust, is not a proper party.*

* The case of VAN WART *a.* PRICE (*Supreme Court, First District; Special Term, December, 1861*), was an action to recover the plaintiff's one-half share of the sum received in the year 1856, by the defendant, from the city of New York, as an award to "unknown owners" for land taken for public purposes. The complaint in this action contained the averments that one Abraham Van Wart died, seized of the land, in 1835, leaving as sole heirs-at-law two sons, Charles E. Van Wart

Spicer *v.* Hunter.

Demurrer to the complaint by the defendant, Jacob Hunter.

The complaint alleged, that December 4, 1843, the plaintiff recovered a judgment in the Supreme Court against John Sniffen, deceased, for \$7,301.25; upon which there was owing to

and the plaintiff;—*Held*, on demurrer, that there was no defect of parties plaintiff in not joining Charles E. Van Wart, or the persons seized, at the time of the award, of the undivided half which plaintiff did not claim.

Demurrer to the complaint.

This action was brought by one of the heirs of Abraham Van Wart, to recover his share, one half of the sum of \$5,139.27, received by the defendant from the city of New York, in the year 1856, being an award to "unknown owners," for four lots of land taken for the Central Park, of which four lots the complaint alleged that Abraham Van Wart, in the year 1835, died seized.

The complaint also alleged that, on the death of Abraham Van Wart, the four lots descended to his sons Charles E. Van Wart and the plaintiff. The defendant demurred to the complaint, on the ground of a defect of parties plaintiff, in not joining Charles E. Van Wart or the person who, at the time of the award, was the owner of the undivided half of the lots not claimed by plaintiff.

Maurice Leyne and *Charles A. Rapallo*, in support of the demurrer.—I. In all actions relating to personal estate, whether *ex contractu* or *ex delicto*, tenants in common must join. Before the Code, the objection of non-joinder in actions *ex delicto*, could only be taken advantage of by plea in abatement; but in actions *ex contractu*, a demurrer was proper when the objection appeared on the face of the declaration. (See 5 *Hill*, 59, *note*.) But under the Code, the objection, when appearing on the face of the complaint, must in all cases be taken advantage of by demurrer. (*Zabriskie v. Smith*, 13 *N. Y.*, 322, 336.)

II. In this State, tenants in common must also join in all personal actions relating to the real estate held in common. It is only in real actions, such as ejectment, &c., that tenants in common can sever. (*Decker v. Livingston*, 15 *Johns.*, 479; *Putnam v. Wise*, 1 *Hill*, 234; *Rich v. Penfield*, 1 *Wend.*, 380; 8 *Cow.*, 304; 8 *Johns.*, 151; 6 *Ib.*, 108; 13 *Ib.*, 286; 14 *Ib.*, 426.)

III. Under the English law of primogeniture, there was no such tenancy in common as exists here among heirs, and the rule was different as to their joinder in actions. There, tenants in common always severed in an avowry for rent, &c. But coparceners joined in an avowry for rent, and in personal actions relating to their estate. Under the law of this State, such heirs, taking as tenants in common, are the same as coparceners under the English law, and the same rules are applicable to actions brought by them.

IV. A verdict and judgment in this action would not conclude the other heirs from claiming that the interest of the plaintiff was less than that claimed by him, and the defendant might be compelled to pay twice. The interests can only be apportioned, so as to bind all parties by joining them all in the action.

V. To sustain the demurrer on the ground of non-joinder of a plaintiff, it is not necessary that it should appear on the face of the complaint, whether the party omitted is still living or not. (*Burgess v. Abbott*, 1 *Hill*, 476.)

VI. This case is analogous to that of *Hill v. Gibbs* (5 *Hill*, 56), where the prin-

Spicer *v.* Hunter.

plaintiff \$1,017.27, with interest; and that he filed a transcript thereof in Kings county. That August 20, 1845, execution was issued thereon to the sheriff of the city and county of New York and returned unsatisfied, except as to \$148.67, which sum was collected. That John Sniffen died January 13, 1853, and

ciples above stated are recognized, and the authorities referred to. The case of *Sherman v. Ballou* (8 *Cow.*, 304-311), is also in point.

John Townshend, in opposition.—I. It does not appear on the face of the complaint that there is any person other than the plaintiff and defendant who has any interest in the subject of the action. There is no presumption as against plaintiff, that Charles E. Van Wart continued to own his one undivided half. The defendant having taken the proceeds of the lots, the presumption would be that he had in the interim acquired Charles E. Van Wart's share. The allegation that the defendant falsely pretended he was owner at the time of the award, does not preclude the construction claimed by plaintiff, because defendant might not have been owner at the time of the award, but acquired the right of Charles E. Van Wart afterwards, and because owner means sole owner, and he was not sole owner.

II. The demurrer is a "speaking demurrer;" it asks in effect to have an additional fact incorporated in the complaint,—namely, that an undivided half was in Charles E. Van Wart, or those claiming through him; this was never admissible at law or in equity, and is not now. (*Coe v. Beckwith*, 31 *Barb.*, 339.)

III. If the defendant had, or is assumed to have had, any interest in the fund, he is co-tenant with plaintiff, and then properly sued. (1 *Rev. Stat.*, 750, § 9; *Cochran v. Carrington*, 25 *Wend.*, 409.)

IV. The action is for money received to the use of plaintiff, no other action could be brought. No wrong, *i. e.*, tort, is done plaintiff; but he has the right, by common law and by statute, to say the money was for his use. If defendant wrongfully took the money, he wronged the city or the court. Plaintiff had his election to demand the money of the defendant or of the court. The statute (2 *Rev. L.*, 418, § 184) does not take away this right. (*Sedw. Stat.*, 1 ed., 402, 93.)

V. If the defendant had possessed himself of the land which the award represented, the plaintiff might have sued for his part alone. (*Kellogg v. Kellogg*, 6 *Barb.*, 116.)

VI. And for the proceeds of the real estate each tenant in common may sue alone.—1. As for the rent. (*Jones v. Felsch*, 3 *Bosw.*, 63.) 2. Double rent. (*Doe v. Hazell*, *Esp. N. P. Cas.*, 107; *Wilkinson v. Hull*, 1 *Bing. N. C.*, 713.) 3. Mesne profits. 4. So in a distress and avowry for rent they could not join. (*Decker v. Livingston*, 15 *Johns.*, 479; *Willis v. Fletcher*, *Cro. Eliz.*, 330.) 5. For trespass in carrying away timber. (*Longfellow v. Quimby*, 29 *Maine*, 186.)

VII. The award severed the tenancy; the money was paid in for each one entitled, according to his share and interest, and each might have applied alone for his share. (*Walsh v. Adams*, 3 *Den.*, 125; *White v. Morton*, 22 *Verm.*, 15.)

VIII. If there can be any tenancy in common of a sum of money, the tenancy is severed by one demanding his part. (*Tripp v. Riley*, 15 *Barb.*, 333; *Brooms' Maxims*, "*Lex spectat naturæ ordinem.*")

IX. The general rule is, that tenants in common must sue alone. The only

Spicer *a.* Hunter.

letters of administration were granted to his widow on January 17, 1853, by the surrogate of Kings county. That on and prior to April, 1836, Sniffen was owner in fee of certain tracts of land in Front-street, Brooklyn, which were incumbered, in portions, by four mortgages, to secure in all the sum of \$4,970. That in April, 1836, Richard Hunter (who had become the owner of two of the mortgages, to the amount of \$3,270), on the application of Sniffen, agreed to foreclose them, and upon a sale to purchase and hold the premises, and permit Sniffen to retain possession and receive the rents, upon condition that thereafter Sniffen would pay the interest on the amount secured by the mortgages, and all taxes and assessments, and keep the premises free from all incumbrances. That thereupon, on February 2, 1837, under foreclosure proceedings instituted by Richard Hunter, the premises were sold at public auction to him, he being the highest bidder; and Frederick De Peyster, the master in chancery, appointed in the proceedings, gave a deed of the premises to the defendant Jacob Hunter, for the benefit of Richard Hunter.

That Sniffen during his life continued in possession of the premises, claiming to be the owner, and received the rents and profits of the lands, with the knowledge and consent of Richard Hunter, and paid the costs of foreclosure and the interest on the mortgages to February 14, 1849, and from that period the sum of \$400, on account of further interest on the mortgages to the time of his death. He also paid interest on plaintiff's judgment to November 1, 1852, and the taxes and assessments until 1846, but he afterwards, contrary to his agreement, suffered the premises to be sold for taxes and assessments to the aggregate amount of \$228.66; and upon the sales, Charles W. Lynde became the purchaser and received four certificates, for

cases where they may join is where, "*naturæ ordinem*," there cannot be a severance of the cause of action and damages. A person entitled to a half, a fourth, or other ascertained part of a fund, may always sue for his part without joining the parties entitled to the other parts. (Hughson *a.* Cookson, 8 *L. J., N. S., Ex.*, 68; Perry *a.* Knott, 5 *Beav.*, 293; Watson *a.* Young, 2 *Eng. L. & Eq.*, 96; Hares *a.* Stringer, 15 *Ib.*, 145; Smith *a.* Snow, 3 *Mad.*, 10; Hutchinson *a.* Townsend, 11 *N. Y.*, 675; Whorwood *a.* Shaw, *Yelv.*, 23.)

W. F. ALLEN, J., rendered judgment for the plaintiff, overruling the demurrer, with leave to answer on payment of costs.

Spicer a. Hunter.

the aggregate term of 1,927 years, which certificates Lynde, in July, 1853, assigned to Addison Vail, who received the leases, and in September, 1856, assigned them to John Sniffen, Jr., his brother-in-law.

That on July 31, 1855, the accounts of the administratrix of John Sniffen's estate were finally settled; and on the accounting, among other things, she was credited with \$189, paid to plaintiff for interest on her judgment since Sniffen's death to August 1, 1853, and she was ordered to pay \$276.21 to plaintiff, being the balance then in her hands.

That previous to this accounting, Richard Hunter, on application of the administratrix, furnished to her a written statement of Sniffen's indebtedness, in which he claimed Sniffen's estate was indebted to him in the sum of \$4,013.92, for principal and interest on the mortgages to February 14, 1853, less \$400, received for interest, on account; and the statement was served on Richard Hunter, and adopted on the final accounting.

That on June 16, 1854, the defendant Jacob Hunter conveyed the premises to Richard Hunter; and the master's deed to Jacob, and his deed to Richard, were then both simultaneously recorded.

That in October, 1856, Richard Hunter commenced an action against Addison Vail and the widow and heirs of John Sniffen, to set aside the decree of foreclosure and sale to Jacob Hunter for Richard Hunter, and to declare the master's deed to Jacob Hunter, and his deed to Richard Hunter, liens by way of mortgage for the amount due on the mortgages assigned to Richard Hunter, and for a sale of the premises to satisfy his debt, or to obtain possession of the premises under the conveyance to him, and the payment to him of the rents, in the mean time, from the parties having the possession, and to set aside the certificates of sales to Lynde, as irregular and void.

That in March, 1857, the allegations in the complaint being denied, a judgment by consent of parties was entered, directing the defendants to execute and deliver to Richard Hunter a release of the premises from all claim they might have, and directing John Sniffen, Jr., to assign the corporation leases to Richard Hunter, and that he be let into the possession of the premises.

That in September, 1856, the widow of John Sniffen died intestate, and no one had since administered on his estate.

Spicer *v.* Hunter.

That Richard Hunter died January 8, 1859, having by will bequeathed the income of the premises to his wife, and all his real and personal estate to George H. and J. B. Hunter, his sons, subject to her life-estate.

The plaintiff thereupon alleged that the agreement between Richard Hunter and John Sniffen, whereby Hunter was to foreclose the mortgages for Sniffen's benefit, and the master's deed to defendant Jacob Hunter, and Jacob's deed to Richard Hunter, were fraudulent and void as against, and made with intent to hinder and delay, Sniffen's creditors, and prayed that the decree of foreclosure, and the master's deed to Jacob Hunter, and his deed to Richard Hunter, and all proceedings in the suit be set aside as fraudulent, and the premises be declared subject to the plaintiff's judgment against Sniffen, and be sold, and out of the proceeds of sale the plaintiff be paid her judgment, with interest and costs.

The grounds of demurrer assigned by Jacob Hunter were as follows:—*First.* That the said complaint does not state facts sufficient to constitute a cause of action. *Second.* That the complaint does not state facts sufficient to constitute a cause of action against the defendant Jacob Hunter.

Mathews & Swan, in support of the demurrer (after discussing other points).—I. The transaction was not fraudulent or void as respects the plaintiff. 1. Unless the transaction was fraudulent *per se*, it is not void against the plaintiff as a subsequent creditor. (Reade *v.* Livingston, 3 *Johns. Ch.*, 481; Every *v.* Edgerton, 7 *Wend.*, 259; Jackson *v.* Brownell, 3 *Cai.*, 222.) 2. Sniffen had no creditors in 1837, and was not insolvent. Therefore, the title of Hunter was not void as against the plaintiff. (Tripp *v.* Vincent, 3 *Barb. Ch.*, 613.)

II. The transaction was not fraudulent as respects existing or subsequent creditors. 1. The arrangement to allow Sniffen to occupy the premises, and pay, as an equivalent for rent, the interest, &c., were, as respects duration, a mere charity, which Sniffen could not enforce, and which Hunter might at any time terminate. Sniffen was a mere tenant at will, or from year to year, as respects third persons. (Hunt *v.* Comstock, 15 *Wend.*, 665.) 2. The agreement being by parol, was not binding upon Hunter, and also was overridden by the master's deed. (Hall

Spicer *a.* Hunter.

a. Shultz, 4 *Johns.*, 240; Sherrill *a.* Crosby, 14 *Id.*, 358; Bander *a.* Snyder, 5 *Barb.*, 63, 71.) There was no agreement to convey to Sniffen, giving him a possible title to retain possession. 3. The agreement between the parties could not prevail (against the terms of the master's deed) to make Hunter a mortgagee as respects third parties. (Lathrop *a.* Hoyt, 7 *Barb.*, 59; Ryan *a.* Dox, 25 *Id.*, 440.)

III. Sniffen having violated the agreement by non-payment, &c., Hunter had a right to revoke it, and insist upon the legal title, as he did. Sniffen and his estate were benefited by his non-payment of any equivalent for the rent of the premises for several years. The creditors of Sniffen cannot complain of this.

IV. Jacob Hunter is not a proper party to this action. (*Story's Eq. Pl.*, §§ 549, 569.) By the plaintiff's own showing, he has no right, title, or interest in the estate in any manner whatever. (Muir *a.* Leake & Watts Orphan House, 3 *Barb. Ch.*, 477; Jessup *a.* Hulse, 29 *Barb.*, 539.)

V. The plaintiff could not have any relief in this action. A creditor's bill cannot be sustained to reach the equitable interest of a judgment-debtor in lands, where the debtor is deceased. The creditor must apply to the surrogate to compel the administratrix to sell. (Wilber *a.* Collier, 3 *Barb. Ch.*, 427.)

Horton H. Burlock, opposed.—I. The agreement made between Richard Hunter and Sniffen, and all the proceedings in the foreclosure-suit, including the master's deed to Jacob Hunter, and the deed from him to Richard Hunter, were and are fraudulent and void as to the creditors of Sniffen.

II. The receipt of the costs in the foreclosure-suit by Richard Hunter, and the interest due on the mortgages sought to be foreclosed in that suit, and the subsequent acts of Richard, in receiving interest on those mortgages, were a waiver of the decree of foreclosure, and estop Richard, or his heirs or devisees, from claiming title through the foreclosure and under the deed from Jacob.

III. The defendant Jacob was a party to the fraud against the creditors of Sniffen, by taking the deed from the master, and, after Sniffen's death, conveying the premises to Richard.

BROWN, J.—The transaction between John Sniffen, deceased,

Spicer & Hunter.

the judgment-debtor of the plaintiff, and Richard Hunter, deceased, and the subsequent proceedings to foreclose the mortgage, and the sale and master's deed to the defendant Jacob Hunter, were not, in my opinion, fraudulent and void as to the creditors of John Sniffen. Taken in connection with the subsequent conduct of the two Hunters and John Sniffen, they converted the master's deed, and the claim under it, into a mortgage, and nothing more. Upon the plaintiff's own showing, the deed, which was executed to Jacob Hunter for the benefit of Richard Hunter, was a valid lien upon the premises therein granted, to the extent of the purchase-money, with the interest. This lien Jacob Hunter, or any other holder, might sell and assign over without fraud, or the imputation of a design to commit a fraud, upon Sniffen's creditors.

The master in chancery, Frederick De Peyster, sold and conveyed the premises to Jacob Hunter for the sum of \$3,150, by deed bearing date April 25, 1837. This was long before the time that the plaintiff became Sniffen's creditor, which was not until December 4, 1843. John Sniffen, it seems, paid the costs of the foreclosure and the interest, leaving unpaid thereon the sum of \$3,270, the principal sum which the mortgages were made to secure the payment of.

It is also alleged in the bill of complaint, that on the 16th day of June, 1854, the defendant Jacob Hunter executed and delivered a deed of conveyance of that date to Richard Hunter, of all his interest in the premises mentioned in the deed to him from De Peyster. I see no interest that Jacob Hunter has in this action; he has done no wrongful act, nor has his conduct interfered with or prejudiced the plaintiff's rights in any way. He has no claim for any relief against him. Without expressing any opinion upon the merits of the other defences urged by Jacob Hunter's counsel on the argument, I am of opinion, for the reasons given, he is entitled to judgment upon the demurrer, with leave to the plaintiff to amend, upon payment of costs.

Fash *a.* Byrnes.

FASH *a.* BYRNES.*New York Superior Court; Special Term, February, 1862.*

NEW TRIAL.—IRREGULARITIES OF JURORS.

The mere fact that a juror attempts to communicate the verdict to the party in whose favor it is rendered, before it is announced in court, is not sufficient ground for setting the verdict aside.

Motion to set aside a verdict.

The facts are fully stated in the opinion.

John H. McCunn, for the motion, cited *Orcutt a. Carpenter* (1 *Tyler*, 250).

Nelson Smith, opposed, cited 2 *Grah. & Wat. New Trials*, 593; *Conro a. Robie* (12 *Pick.*), 516.

WHITE, J.—This action was tried before a jury at the last November term of this court, and a verdict was rendered for the plaintiff, upon which verdict a judgment has been entered, and an appeal taken to the general term of this court.

A motion is now made to set aside the verdict, upon the ground of alleged misconduct on the part of one of the jurors and of the plaintiff.

The defendant and two other persons, who were present at the trial, make affidavits, in each of which the charge of misconduct is stated in these words: "After the case was tried, and the jury therein had retired to their room, before their names had been called, and before they had delivered their verdict, one of the jurors, the third from the foremost, went stealthily to the plaintiff, and handed him a slip of paper, about one and a half inches in width and of the same length, and whispered into plaintiff's ear; plaintiff's countenance thereupon changed to a scarlet; and putting his hand into his pocket, and taking therefrom something, slipped the same into the hands of the

Fash & Byrnes.

said juror. This occurred before the verdict was rendered, and deponent believes that said plaintiff had corrupted said juror."

The plaintiff, in an affidavit which is corroborated by the affidavit of his counsel who tried the cause and was present at the occurrence related in the defendant's affidavit, states the transaction as follows :

"When the jury, after the cause had been submitted to them, came into court to render their verdict, deponent (the plaintiff) was sitting immediately in front of the jury, between the table for counsel and the jurors' seats; as they came in one of the jurors handed deponent a little slip of paper with some figures on it; deponent immediately, without looking at it, handed the same to deponent's counsel, who looked at it and immediately handed it back to deponent, and told deponent to give it back to the juror from whom deponent received it, that it was the amount of the verdict, and that the juror had probably made a mistake in handing the said slip of paper to deponent instead of the clerk; deponent immediately handed the said slip of paper back to the juror, and told him he had better hand it to the clerk. Deponent did not know, and was not in any way acquainted with either of the jurors who formed the panel before whom said cause was tried; he did not, and does not know their names or either of them; he had not before, and has not since said trial spoken to either of said jurors, and has never had any conversation by word of mouth or otherwise in any way whatever with either of said jurors, except to tell said juror, who handed deponent said paper, to hand it to the clerk as aforesaid; deponent did not put his hand into his pocket after receiving said paper, before handing the same back as directed by his counsel; deponent did not know, and does not yet know what was on said paper, except that deponent's counsel at the time told deponent it was probably the amount of their verdict; deponent did not put into said juror's hand or give to him any thing except said paper; deponent has never in any way or manner, directly or indirectly, given to either of said jurors who composed said panel any thing whatever except to hand back said paper as aforesaid, and has never in any way corrupted either of said jurors, or said or done any thing in any way whatever to influence their verdict, except as a witness on the trial of said case in open court (the plaintiff was examined as a wit-

Fash *a.* Byrnes.

ness on the trial). Deponent's countenance did not change to scarlet; deponent did not understand what said paper meant when it was handed to him, and handed it to his counsel at the same time to know, when his counsel instantly told deponent to hand it back as aforesaid."

The foregoing presents the whole statement on both sides, which I have given at length in the language of the affidavits, so as to exhibit the allegations more fully and accurately. They present, when taken together, no ground for setting aside the verdict. The suspicion of corrupt communication between the plaintiff and the juror, suggested by the defendant's affidavit, is entirely dissipated by the explanatory deposition of the plaintiff and his counsel. The conduct of the juror in handing to the plaintiff a slip of paper mentioned in the affidavit was undoubtedly improper and deserving reproof, as no infringement should be tolerated of the rule that prohibits jurors from intercourse or communication with the parties litigant before them, except in the manner prescribed by the law and the practice of the court. But it is not every impropriety or irregularity of that kind that should be held to vitiate a verdict, or deprive an innocent party to the action of the benefit of it. To produce that effect the act complained of must be something affecting the impartiality, regularity, and purity of the verdict itself; and the impropriety that happened in this case, occurring in open court, without complicity on the part of the plaintiff, after the jurors had agreed upon their verdict, and had returned to their places in the court-room to announce it, cannot be regarded as an irregularity of so serious a character as to justify the consequences demanded by the defendant.

In support of this motion, the defendant has cited the case of *Orcutt v. Carpenter* (1 *Tyler Vt.*, 250), in which a verdict was set aside because a juror, after the jury who were to deliver a sealed verdict had sealed it, but had not yet delivered it, intimated, in a conversation with some stranger outside, the nature of the verdict. The court, in that case, set aside the verdict upon the ground that the facts proved showed misconduct of the juror, of so grave a character, under the laws of that State, as to impeach his moral capacity and fitness to act as a juror in that cause, the disclosure of the verdict being a violation of the oath then administered to jurors in civil cases in the State of

The People *v.* Kane.

Vermont, which oath, it appears, from the report of the case, contained the following clause :

"Your own counsel, and that of your fellows, you will duly observe and keep ; you will say nothing to any person of the business and matters you have in charge, but to your fellow-jurors ; nor will you suffer any one to speak to you about the same but in court ; and when you have agreed on your verdict, you will keep it secret until you deliver it in court."

Whatever wisdom there may be in prescribing such an oath as the above for jurors in civil cases, there is no such oath in use in the civil courts of this State ; the only form administered being—"You will well and truly try the several causes in which you may be impanelled, at the present term of this court, and true verdicts render, according to the evidence."

In the present case the juror may, undoubtedly, be considered as having disclosed the verdict before it was delivered ; and if the decision in 1 *Tyler* could have application to the forms of jury trials as they exist in the courts of this State, I should grant the defendant's motion ; but as that decision was based upon grounds that do not exist, and cannot be considered here, I must disregard it, and for the reasons I have already stated deny the motion.

THE PEOPLE *v.* KANE.

Supreme Court, Second District ; General Term, Dec., 1861.

SEDUCTION UNDER PROMISE OF MARRIAGE.—CHASTE CHARACTER.—
BURDEN OF PROOF

On an indictment for seduction under promise of marriage, under the Laws of 1848, ch. 111,—which constitutes such an act a misdemeanor,—although an express promise on the part of the defendant ought to be proved, it is not necessary that there should be proof of an express promise on the part of the person seduced, in order to support defendant's promise. A promise on her part, if necessary at all, may be inferred from circumstances.

The People *v.* Kane.

It seems, that a promise on the part of the defendant alone, if express, is enough to sustain a conviction.

On an indictment for seduction under promise of marriage, the previous chaste character of the complainant is presumed until evidence impeaching it is produced.

Certiorari to review a trial and conviction.

The defendant was tried in the Kings County Court of Sessions, Hon. Samuel Garrison, County Judge, presiding, on an indictment for seduction under promise of marriage.

After the testimony had been closed on both sides, defendant requested the court to charge, that to convict the prisoner of the offence charged, there must have been a promise of marriage, and that such promise must have been a legal promise, viz., a mutual promise; which the court declined to do, but charged that the promise need not be mutual, but that the jury could not convict unless they found, from the testimony, that the complaining witness consented to and was induced to have intercourse, by reason of a subsisting promise of marriage; that they must find whether she was seduced under the promise of marriage, or otherwise, to which refusal and charge prisoner excepted. Defendant also requested the court to charge that the prosecution were bound, affirmatively, to prove the previous chaste character of the complainant, which the court declined to do, but charged the jury that no such proof on the part of the prosecution was requisite, but that previous chaste character was presumed, though defendant might attack it and show to the contrary if he could, to which refusal and charge the prisoner excepted. The jury rendered a verdict of guilty, and the defendant was thereupon sentenced by the court to imprisonment in the penitentiary for one year.

The prisoner's counsel prepared a bill of exceptions, and obtained a writ of certiorari, returnable at general term of the Supreme Court.

Winchester Britton, for the prisoner, relied upon the exceptions taken to the charge of the county judge.

John Winslow, district-attorney for the People.—I. It is only necessary to allege in the indictment, that in the terms of the

statute, the defendant did seduce, and have illicit connection with the prosecutrix, "under a promise of marriage" (People *a.* Taylor, 3 *Den.*, 91); and the proof need go no further in this respect than to sustain the allegation of the indictment. (Crozier *a.* The People, 1 *Park. Cr.*, 453.)

II. The court charged correctly, in leaving to the jury to find whether the seduction occurred under a promise of marriage, or otherwise. The court left it to the jury to say whether the prosecutrix yielded to the solicitations of the seducer, in consequence of his promise to marry her. Such promise, on the part of the female, would be implied, if she yielded to the solicitations of the seducer, in consequence of his promise to marry her. Her assent to his promise of marriage completes the contract, and makes it mutual. (Crozier *a.* The People, *supra*; *Exodus* xxii., 16.)

III. It would be absurd to say that the prosecutrix could be influenced by a promise of marriage which she herself had not assented to. The jury having found that she was thus influenced when the illicit connection occurred, must have found also that she assented to the promise. The former includes the latter.

IV. The previous chaste character of the prosecutrix is presumed; the defendant might attack it if he could. (People *a.* Safford, 1 *Park. Cr.*, 474; Crozier *a.* People, *Ib.*, 453.) Good character is to be presumed of parties, witnesses, &c., until the contrary is shown. Chastity is to be presumed.

BY THE COURT.*—BROWN, J.—Promises to marry, seldom, if ever, rest upon considerations pecuniary in their nature, and a consideration is quite as necessary to support such promise as it is to support any other. From the very nature of the marriage contract, the promises are mutual, and the one thus becomes the consideration for the other.

In an action by a female to recover damages for a breach of a promise to marry, it never was deemed indispensable for her to prove an express promise on her part, in order to make out a consideration; but such promise will be inferred from the circumstances which usually attend upon the conduct and demeanor of the parties towards each other. In short, the con-

* Present, EMOTT, P. J., BROWN and SCHRUGHAM, JJ.

sideration must be stated in the pleadings, but it need not be expressly proved, but may be inferred and implied.

Upon the trial of this indictment against Joseph Kane, for seduction under a promise of marriage, the court was asked by the counsel for the prisoner to charge the jury, "that to convict the prisoner, there must have been a legal promise of marriage; that is, a mutual promise," which the court declined to do, but charged, "that the promise need not be mutual;" but the jury could not convict unless they found from the testimony that the complaining witness consented to and was induced to have intercourse by reason of a subsisting promise of marriage, and they must find whether she was seduced under promise of marriage, or otherwise.

To this there was an exception. To convict under this statute the prosecutor must, I think, prove an express promise by the prisoner. And I am inclined to think, that when the testimony shows a seduction accomplished by means of such a promise, it is enough, and without any thing further, will justify a verdict of guilty.

The statute means a promise to marry, and does not demand that it be a promise upheld by a corresponding promise to marry by the person seduced.

Be that as it may, however, it is not material to the decision of this exception.

What the court was asked to charge, by the prisoner's counsel, was, that there must have been an express promise by the person seduced, in order to support the promise made by the prisoner, and that was what the court declined to do. But the court did not say that the jury might not have inferred the promise on the part of the complainant, from her assent to the intercourse. In a civil action the evidence would have been abundantly sufficient for that purpose.

I think the exception was not well taken.

The prosecution was not bound to prove the previous chaste character of the complainant. This was to be presumed until it was damaged by evidence impeaching it.

The judgment should be affirmed, with the usual direction that the prisoner be committed under the sentence pronounced by the Court of Sessions.

The People on rel. Adams a. Baker.

THE PEOPLE *on rel.* ADAMS *a.* BAKER.

Supreme Court, Fourth District ; Special Term, June, 1861.

MANDAMUS.—SETTLEMENT OF CASE.—PLEADINGS UPON MANDAMUS.—AMENDMENT.

A mandamus is the proper remedy to compel the settlement of a case or bill of exceptions, and to settle it correctly. But before the writ will be issued to compel a settlement in a particular way, it must appear that the case will then be in accordance with the facts.

On the return to an alternative mandamus to a referee, requiring him to settle a case as therein prescribed, where the recitals did not set forth that the proposed settlement would be in accordance with the facts,—*Held*, that the writ was defective in not containing such an averment in a traversable form.

On the return to an alternative mandamus, facts material to the issue occurring after the issuing of the writ may be pleaded.

It seems, that a writ of mandamus may be amended after it is returnable.

Demurrer to portions of return to an alternative mandamus, and to relator's plea to a portion of the return.

The relator had been plaintiff in an action against the Fort Plain Bank arising upon contract: the issues had been referred to the present respondent, who reported in favor of the plaintiff for \$78.10; judgment was entered upon the report and the relator appealed. A case was prepared by the relator and was submitted, together with the amendments proposed on behalf of the Fort Plain Bank, to the respondent for settlement. After the settlement of the case the relator procured an alternative mandamus directed to the present respondent, requiring him to correct in certain specified points his former settlement of the case, or show cause, &c.

The writ omitting most of the specifications was as follows:

The People of the State of New York to Hezekiah Baker, greeting:

Whereas, it has been lately represented to us in our Supreme Court before our justices thereof, on the part and behalf of

The People on *rel.* Adams *a.* Baker.

{ Montgomery } Henry C. Adams, that in a certain action pend-
 { County } ing in our said court wherein the said Henry C.
 { Seal. } Adams was plaintiff and the Fort Plain Bank
 was defendant, and which said action was by
 order of our said court duly referred to you as sole referee to
 hear and decide the same; and which said action was tried
 before you, wherein you made your report in writing, bearing
 date February 14th, 1859, and filed, and judgment duly entered
 thereupon in favor of said plaintiff and against said defendant
 for recovery of \$78.10, and costs and disbursements of \$76.93;
 and to which said report the plaintiff has duly filed his excep-
 tions, and served the same, specifying his exceptions to said re-
 port as to your findings of facts and decisions as matters of law;
 and from which said judgment the plaintiff has duly appealed
 to the general term of our said court, and has duly made and
 served a case and exceptions, and tendered the same to you,
 upon due notice to the attorney of the defendant, and requested
 you to settle and sign the same. To which said case and excep-
 tions as proposed by the plaintiff, with the amendments thereto
 allowed by said plaintiff, you refused to sign, but have allowed
 divers proposed amendments thereto, and have made divers
 amendments thereto not proposed, to the great wrong and injury
 of said plaintiff.

Whereupon we being willing that justice should be done in
 the premises, do command you, that you, the said referee, settle
 and sign the said proposed case and exceptions with the 1st, 6th,
 23d, 27th, 34th, and the 5th and 6th paragraphs of the 44th
 proposed amendment thereto, marked "allowed" by the plain-
 tiff therein; and with the following matters and things corrected
 in the former settlement of the same; to wit:

1st. By disallowing the third proposed amendment, proposing
 to insert after the word "defendant" in the 7th line, folio 1, the
 figure "1st," and allowing the words "embraced in the judg-
 ment-roll" as stated in the case and exceptions.

[Here followed 13 proposed corrections.]

And that immediately upon such settlement and signing of
 the case substantially as required by this writ, you deliver the
 same to the relator.

Or in default thereof that you make known to us in our Su-
 preme Court, before our said justices thereof, at the court-house

The People on *rel.* Adams *a.* Baker.

in the city of Schenectady, on the third Tuesday of August next, at the opening of the court on that day, or so soon thereafter as counsel can be heard, why you have not done the same.

And have you then there this writ.

Witness, A. B. James, Esq., presiding justice of said court, at the court-house in Caldwell, the 2d Tuesday of July, 1859.

D. V. BERRY,

H. C. ADAMS, attorney.

Clerk of Montgomery Co.

The order allowing this writ required the relator to tender a case with the proposed corrections to the referee, and to leave the same with him at the time of the service of the writ which was done. The defendant made a return to the writ, containing 27 counts.

The relator demurred specially to 26 counts and plead to the 27th count, and to this plea the defendant demurred specially. The parties joined in demurrer, and the whole case came before the court upon special demurrers involving questions which sufficiently appear in the opinion.

H. C. Adams, relator, in person.—I. The relator is entitled to the relief sought by the writ, in each count or portion of it. 1. A writ of mandamus will issue out of a superior court directed to an inferior court or tribunal, requiring them to do some particular thing therein specified, which appertains to their duty or office, which the superior court supposes to be consonant to right and justice. (3 *Blackst. Coms.*, 110; 4 *Hill*, 581, *COWEN, J.*; 3 *Stephs. Comts.*, 681; and see *Sikes a. Ransom*, 6 *Johns.*, 279; *Delavan a. Boardman*, 5 *Wend.*, 132; *McCullough a. Mayor, &c.*, 23 *Ib.*, 458; and see *Shepard's Note* in 2 *Johns. Cas.*, 217, viz., §§ 24, 30, 35, 37, on pp. 27, 32, 37, 43 of Note.) 2. It is the proper remedy to compel all inferior tribunals to perform the duties required of them by law. (*Comm a. Hampden*, 2 *Pick.*, 414; 4 *Ib.*, 68; 7 *Ib.*, 340; 10 *Ib.*, 244; 21 *Ib.*, 258.) 3. If the truth of the case be fairly stated, it shall be the duty of the judge or court "to sign and seal the same." (See 3 *Rev. Stat.*, 5 ed., 720; old ed., 2 *Rev. Stat.*, 422, § 78 [§ 75]; 1 *Cai.*, 511; 2 *Ib.*, 376; 2 *Johns. Cas.*, 118 [217 and note §]; 6 *Johns.*, 279.) Or to amend the case according to the truth of the facts. (6 *Johns.*, 279; and see

Shep. Note, §§ 24, 27, 30, 46, on pp. 27, 29, 32, 61 of *Note*; 5 *Wend.*, 132.) 4. In the case in question, the referee struck out various matters not proposed by defendant to be stricken from the case. See especially as to the matter in the second count of the writ, &c. This the referee had no power to do. (*Denison a. Seymour*, 5 *Wend.*, 103.) The only specific remedy for such wrongs is by mandamus. An action on the case against the referee would not be a specific remedy, and would not obtain *the* thing, &c. Nor would an indictment obtain the thing asked. The only specific remedy, then, is by the peaceful and effectual suit by mandamus. (*Rex a. Severus*, 2 *B. & A.*, 646; and see 23 *Wend.*, 258.) 5. Of the mode of proceeding by writ of mandamus, see *Shepard's Note*, 61-81, § 46. The Revised Statutes, part 3, ch. 9, t. 11, art. 3 (2 *Rev. Stat.*, 586, *m. p.*), refer to these proceedings as known at common law. (See *Shep. Note*, 75, § 63.)

II. The writ is sufficient in form and substance. It sets forth a good title. 1. There is no defect of substance in the writ. It charges the defendant with refusing to settle and sign the case presented, and with "allowing divers proposed amendments, and with making divers amendments not proposed, to the great wrong and injury of the relator." That sets forth a good title in substance within all the cases. 2. It refers to the case as a paper in the cause, accessible to all, and within the knowledge of all parties, point by point and folio by folio, and thus the writ and case are inseparably wedded. It is sufficient in form. (*People a. Judges of Westchester C. P.*, 4 *Cow.*, 73; see form, 1 *Id.*, 22; and all the forms, *Shep. Note*, 81, *et seq.*) If the writ fairly indicates the duty to be performed, no precise form is necessary. (*Shep. Note*, 66, § 52; *Sayre*, 37.) 3. If the writ could be called defective for not setting out the case in detail, it could be called only a defect of form; and for such a defect the defendant must move to quash before making his return. (10 *Wend.*, 25; 1 *How. Pr.*, 186.) Technical objections must be urged before return is made. (See *Shep. Note*, 67, § 55, and cases.) 4. No objection can be urged to the form of the writ or the substance of it, except upon special motion, founded upon notice, to supersede or quash it. (*Shep. Note*, 68, § 55, near end; 1 *Wils.*, 30; 3 *Steph. N. P.*, 23.) There is no objection now before the court as to the sufficiency of the writ.

III. The return is defective for all the reasons specified in the demurrer as to each count. 1. The return must be certain and full, and must state with certainty those facts which constitute a defence to the mandamus. It ought to contain a full and certain answer, &c., and to disclose a just and legal reason why the mandamus should not be obeyed. (*Shep. Note*, 70, § 58; 10 *Pick.*, 59.) 2. In point of form, a return requires the same certainty and precision as in declarations and other pleadings, or an indictment or return to a habeas corpus. (*Shep. Note*, 70, § 58; 1 *Harr. & Johns.*, 551; *Dougl.*, 157, 158.) 3. A return of two repugnant causes is like a declaration where two inconsistent counts are contained. (*Ib.*; 2 *Term R.*, 456, 461.) 4. Where several causes returned to a mandamus are inconsistent, the whole must be quashed, because the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconsistent counts are joined; there the plaintiff cannot have judgment. (*Shep. Note*, 71, § 58; 2 *Term. R.*, 456; 5 *Ib.*, 66; 6 *Ib.*, 493.) 5. It must, like any other pleading, aver facts, not evidence. (See 10 *Wend.*, 323; 2 *N. Y.*, 490.)

IV. As to the pleadings in mandamus cases. 1. The pleadings shall be, and the proceedings thereon shall be, as in civil actions. (2 *Rev. Stat.*, 586, § 15 [§ 55].) 2. The writ performs the office of a declaration, and the return must answer the averments in the writ. (*Shep. Note*, 70, § 58; 2 *N. Y.*, 490.) 3. Matters which should come more properly from the other side need not be stated. (1 *Chitt. Pl.*, 222 q., 228 p.) 4. In alleging the fact, it is unnecessary to state such circumstances as merely tend to prove the truth of it. (*Chitt. Pl.*, 225 l.) 5. A pleading is a statement of facts, and not a statement of argument. It is, therefore, a rule that a plea should be direct and positive, and advance its position of facts in an absolute form, and not by way of rehearsal. 6. It must be capable of trial, and therefore must consist of matters of fact; &c. (*Ib.*, 541, 8thly.) 7. It must be true and capable of proof. (*Ib.*, 9thly.) 8. It must be consistent; no part repugnant to another part. 9. If a pleading be drawn in a negligent, slovenly, and untechnical manner, disgraceful to the records of the court; or if it be in every respect insufficient, uncertain, defective in form, &c., it is ground of demurrer. (See *Humph. Prec.*, 1003;

The People on rel. Adams a. Baker.

3 *Chitt. Pr.*, 1247; 10 *Wend.*, 32; 2 *N. Y.*, 496.) 10. The return is obnoxious to all the foregoing objections; the demurrer should be upheld.

V. The practice at and subsequent to the hearing. 1. On coming in of the return to an alternative mandamus, the papers on which the original motion was made must be presented, and the points stated in writing in support of the application. (2 *Wend.*, 255; see 1 *Ib.*, 318; SAVAGE, J., 320.) But as the question here is on demurrer, the points are sufficiently stated in the demurrer. 2. If judgment be for the relator upon demurrer or default, a peremptory writ will be granted without delay. (2 *Rev. Stat.*, 587, § 17 [§ 57]; *Shep. Note*, 79, § 69, and cases; 3 *Steph. N. P.*, 2330, and cases in note 83.) And the relator is entitled to damages and costs. (*Ib.*; and see *Wend.*, 301; 18 *Ib.*, 534.) The defendant is also liable to a penalty of \$250. (2 *Rev. Stat.*, § 20 [§ 60].) 3. It is a legal presumption that the referee is indemnified by the party in interest. (18 *Wend.*, 534.)

Hezekiah Baker, defendant, in person, cited 5 *Wend.*, 132; 10 *Ib.*, 25; 2 *Comst.*, 490; 9 *Wend.*, 429; and claimed substantially, on the argument, that he had settled the case under Rule 34 (*Supreme Ct. Rules*), and that he had exercised his discretion in so doing, and that such discretion could not be reviewed, and cited 14 *Barb.*, 52; 1 *Hill*, 362; 12 *Johns.*, 416; and that under Rule 34 his settlement was a finality.

II. The writ claims too much, in asking the referee to sign the case. (*Code*, § 264.)

Henry C. Adams, in reply.—I. 5 *Wend.*, 132, is not in point. That case does not decide that the power does not exist in the court to grant a mandamus, at least an alternative writ, in such a case. It merely decides what the practice was "in the first instance," before granting a peremptory mandamus. An alternative mandamus is in the nature of an order to show cause. (See 4 *Cow.*, 403; 13 *Wend.*, 655, *note*.) Therefore there is no practical difference between it and an order of review. In 10 *Wend.*, 25, it was decided "that the relator must set forth his title;" and also, if the writ is defective, either in form or substance, the defendant may move "to quash it." In 2 *N. Y.*,

490, it was decided that "an alternative mandamus is in the nature of a declaration, and must state a good title in substance." These cases (10 *Wend.*, 25, and *People a. Ransom*, 2 *N. Y.*, 490) are analogous, and prove nothing against the relator's case.

II. 1. Rule 34 of 1858, provides no new practice. 2. Errors in the settlement, &c., were always corrected by motion for review, before peremptory mandamus; or by an alternative mandamus, &c. 3. To construe the Rule as claimed by the defendant, parties might, either through inadvertence, malice, or corruption of the court or referee, be deprived of their substantial rights. *Ubi jus ibi remedium.* (*Broom's Legal Maxims*, 146.) 4. If the court, by Rule 34, intended to place us within the arbitrary grasp of one man, then we respectfully deny the power of the court thus to judicially legislate the rights of person and property into such narrow and dangerous limits. 5. The settlement of the case was wrong, in loading it with useless records, &c., and was in direct violation of Rule 36.

III. 1. The objection, that the referee cannot be compelled to sign the case, is not before the court in proper form, *i. e.*, there is no motion before the court, founded on notice, to supersede or quash the writ for any cause—such is the practice. (*Shep. Note*, 68, § 55, and cases; and such was the practice in 4 *Cow.*, 73; 1 *How. Pr.*, 186.) 2. The defendant entered a rule, and gave notice to the relator, requiring him to demur, &c., which was done, and defendant joined in demurrer. A motion to supersede or quash the writ should have been made before the rule and notice requiring the relator to demur, &c. The objection comes too late. 3. The Code, § 264, does not deprive the appellant of the right to the best evidence of the settlement, corrections, &c., if he desires such evidence, by the signature of the referee to the settled and corrected case. 4. The objection is technical, and should have been urged upon a motion, &c., to supersede or quash the writ before the return was made. (*Shep. Note*, 67, § 55, and cases; 6 *Cow.*, 532; *Fuller a. Plainfield*, 2 *Salk.*, 433, pt. 12; *Ld. Raym.*, 563.)

BOCKES, J.—This case comes before me on two demurrers: one by the relator to a part of the defendant's return to the alternative writ of mandamus issued to him; the other by the

The People *on rel.* Adams *a.* Baker.

defendant to the plea of the relator to the remaining part of such return.

A history of the proceedings prior to the issuing of the alternative writ is necessary to an understanding of the legal questions presented by the demurrers.

The relator commenced an action in assumpsit against the Fort Plain Bank, claiming to recover as assignee of certain demands which were alleged to have been transferred to him. The cause was put at issue, and was referred to the defendant herein as sole referee to hear and determine, by an order granted November 27, 1855.

The cause was brought to trial before the referee, who made and delivered his report, bearing date February 14, 1859, whereby he awarded judgment against the bank, and in favor of the relator, for \$78.10, with costs of the action. On this report judgment was entered, April 20, 1859, for \$155.03, damages and costs.

The relator took exceptions to the report of the referee, and having appealed from the judgment, tendered a case and exceptions, to which amendments were proposed.

On the settlement of the case the referee allowed certain of the proposed amendments (the relator objecting), and thereupon the relator moved the court for a writ of mandamus, to be directed to the referee (present defendant), to compel him to disallow such proposed amendments, to the allowance of which he had objected. An alternative writ was awarded him, by an *ex-parte* order granted July 13, 1859, and thereupon the writ, now before me, issued, tested the second Tuesday of July.

To this writ the defendant made return, whereby, after admitting the pendency of the action in which the relator was plaintiff and the Fort Plain Bank was defendant, and that he was duly appointed sole referee therein, he set forth in detail all the proceedings had before him, making exhibit of all papers used on the trial, with the several objections interposed by the parties during the trial, with his rulings thereon, and also his report and direction for judgment. 2d. That the case was submitted to him for settlement by the parties on the 7th of June, 1859. 3d. That on the 21st of June, 1859, upon due consideration and careful examination he settled it, as he deemed, according to the truth of the facts of the case, as the same took

place on the trial before him, and as in his return set forth. Except that he (on such settlement) disallowed the 1st, 2d, and 4th paragraphs of the 44 proposed amendments, whereas the same should have been allowed by him. 4th. That on the 22d of June, 1859, he delivered to the plaintiff the case and proposed amendments, with his certificate of settlement, and also all the papers and records submitted to him, and that the same had never been returned to him. And for that reason he could not make the case, amendments, and certificates of settlement a part of his return; and further, that if it should be necessary, the relator be required to furnish them. 5th. That he had duly and truly settled the said case according to the truth, and that to settle the said case in the manner required by said writ would be contrary to the truth of the facts of the case. 6th. That he delivered the case, proposed amendments, and certificate of settlement, to the relator to be engrossed, and that the relator agreed to return the same for his signature, and that the relator had not returned the case engrossed as settled, or requested him to sign the same, and he denied that he had refused to settle or sign it, and averred that he had duly settled the same. 7th. That the case was abandoned by reason of relator's neglect to file the same as settled, according to the rules and practice of the court. And that an order to that effect had been duly entered.

To this return of the defendant the relator interposed a demurrer and plea: a demurrer to those parts which he denominates the first twenty-six counts of the return; and a plea to the last part, whereby the defendant sets up in answer to the writ that the case was abandoned, and which last part he denominates the twenty-seventh count of the return.

I understand the demurrer was intended to cover the entire answer or return of the writ, except that part to which the plea is interposed.

This may not appear very clearly, as the demurrer lacks precision in regard to the portions of the return therein designated as counts.

The plea set up, that the order declaring the case abandoned, was thereafter and on the 24th of October vacated, and to this plea the defendant demurs for insufficiency. So the entire case is now before the court on demurrer.

The People on rel. Adams v. Baker.

The writ of mandamus issues when some legal right has been refused, and there is no other appropriate and adequate remedy. It extends to all inferior courts, tribunals, and officers, executive, ministerial, and judicial. As to judicial duties it merely commands the court or officer to proceed, without directing the manner in which the duty shall be executed, but in other cases it directs the mode and manner as well.

It has been held to be the proper remedy to compel the settlement of a case or bill of exceptions (5 *Wend.*, 132; 1 *Car.*, 511), also to amend the same (6 *Johns.*, 279), but according to the facts. So a referee may be compelled by mandamus to settle a case and exceptions, and to settle it correctly. But before the writ will be issued to compel the settlement in a particular way, it must be made to appear that it will then be according to the facts.

A proceeding by mandamus is in the nature of an action, the writ standing for and taking the place of the first pleading, and enough must appear on the face of the writ to justify the mandatory part. It should, therefore, contain all those facts which are necessary to show the title of the applicant to the relief demanded. If the writ be sufficient, and the defendant is unwilling to obey its directions, he must make return, in which he must show excuse for his disobedience. The return must be good, tested by the ordinary rules of pleading both in form and substance, and stands as the second pleading in the action or proceeding. To the return the relator may demur, or plead to all or any of the material facts contained in the return, and in case a plea is interposed the person making return may reply or demur thereto, and so on alternately, until the issue or issues between the parties are formed. (2 *Rev. Stat.*, 568, § 55; 3 *Ib.*, 5 ed., 898.) If a demurrer be interposed, the question will be upon the sufficiency of the pleadings, the same as in an ordinary action, and the party must fail who commits the first error in matter of substance. So it was held in *People v. Ransom* (2 *N. Y.*, 490), that an alternative mandamus was in the nature of a declaration (complaint), and must state a good title in substance; and that on demurrer to the return, the relator must fail if his writ be substantially defective. (See, also, 14 *Barb.*, 52; 10 *Wend.*, 25; 32 *Barb.*, 473.)

The writ will be deemed substantially defective too, if it

The People on *rel.* Adams *a.* Baker.

demand too much (1 *Hill*, 50, 55), although it is suggested in this case that there may be exceptions to this rule.

It becomes necessary, therefore, first to determine the sufficiency of the writ. This, as has been seen, must show facts sufficient to entitle the relator to the relief which he claims, and he must show his right to all he claims. Nor can reference be made to the affidavit on which the order was granted, in aid of the writ in this particular. (10 *Wend.*, 25; 7 *Id.*, 874.) The defendant is required only to meet the case stated in the writ by traversing the facts there recited or averred, or by admitting them and setting up new matter in avoidance.

The defendant in this case is commanded to settle and sign the case and exception, in the writ mentioned "with the 1st, 6th, 23d, 27th, 34th, and the 5th and 6th paragraphs of the 44th proposed amendments thereto, marked 'allowed' by the plaintiff therein, and with the following matters and things corrected in the former settlement of the same, to wit, 1st, by disallowing the third proposed amendments, proposing to insert after the words 'defendant' in the 7th line, fol. 1, the figure '1st,' and allowing the words 'Embraced in the judgment-roll,' as stated in the said case and exceptions. 2d. By allowing '1st,' " and so on, specifying a great number of particulars in which words or sentences should be allowed or disallowed, and finally, "that immediately upon such settlement and signing of the case substantially as required by the writ, you deliver the same to the relator."

The question now is, whether a case is made by the writ showing the relator entitled to have the case and exceptions settled by the defendant, and in the way therein specified, and also signed and delivered to him. The recitals in the writ are to be taken as averments, on which the relator may predicate his right to the relief claimed. It recites the pendency of a suit, in which the relator was plaintiff, and the Fort Plain Bank was defendant; that the action was referred to the defendant as sole referee, to hear and decide it; that it was tried before him; that he made his report therein; that judgment was entered thereon; that he, the relator, took exceptions to such report, and appealed from the judgment entered thereon; that he made and served a case and exceptions, and tendered the same, with the proposed amendments, to the defendant, and

The People *on rel.* Adams *a.* Baker.

requested him to settle and sign the same as proposed by the relator, with the amendments thereto allowed by him, the relator; that the defendant refused to sign, but allowed and made divers amendments thereto, not proposed, to relator's great wrong and injury.

On these recitals the right of the relator is made to depend. It will be readily observed that there is an important omission. The writ does not show that the corrections desired were in accordance with the facts as they occurred before the defendant on the trial. It should have contained appropriate recitals, from which it could be seen that the case and exceptions, when settled according to the requirements of the writ, would give a true history of the trial, especially in the particulars therein specified. The court will not command the case to be falsely settled, but according to the truth. So it will not direct a settlement in a particular way until it be made to appear that it will then accord with the facts. If it had been recited that the defendant refused absolutely to settle the case, this, in connection with the other recitals in the writ, would have authorized a mandamus requiring him to proceed and settle it, not, however, in any particular way. The writ in this case commands the defendant to settle the case and exceptions by disallowing certain words and sentences, and allowing others. Yet there is nothing in the writ, to which our examination must now be confined, showing that the case thus settled would truly detail the events of the trial. It was held in *People v. Supervisors of Westchester* (15 *Barb.*, 607), that the alternative writ should set forth, in a traversable form, the facts relied upon as entitling the relator to the relief sought, and that the affidavit upon which it was granted formed no part of the record. The writ is substantially defective in the particular above considered. It is not a mere defect in form. There is an omission of a substantial statement or recital, essential to the relator's title to the relief claimed. The relator in this case demands more than the mere settlement of the case and exceptions. It appears from the writ, if not directly, certainly inferentially, that the defendant has already settled the case. But he demands that it be settled in a particular way, without showing any right to have the settlement so made. The writ, in my judgment, is substantially defective in this regard. It is also urged

that it demands too much—in this, that it not only requires the case and exceptions to be settled, in a particular way, but also that it be signed and delivered to the relator. It is quite true that, under the present practice, no signing or sealing is necessary (11 *N. Y.*, 480); and it may be very doubtful whether, when settled, the case should not be, in strict practice, filed with the clerk rather than be delivered to the party. But I shall rest my decision, as to the sufficiency of the writ, on the ground above discussed. Under this view of the case it is unnecessary to consider either the return or the plea. It is plain, however, that the return is unjustifiably prolix, being principally made up of irrelevant and redundant matter. It is also quite informal. It would doubtless have been stricken out in whole or in part, on motion. (2 *Comst.*, 495; 11 *How. Pr.*, 89; 8 *Id.*, 358.) A return should be good in form and substance, tested by the ordinary rules of pleading. It should state facts and not evidence, and should be certain, to a common intent. And while the party is at liberty to interpose several independent defences, if consistent one with another, still the matter of defence should be so presented as to admit of single and distinct issues.

There is at least one part of the return which is good in substance—that whereby the defendant avers that he has duly and truly settled the case, according to the truth; and that to settle it in the manner required by the writ, would be contrary to the truth of the facts of the case. If the writ be regarded as demanding only that the case and exceptions be settled, and that truly, then this is clearly a full and perfect answer; but if the decision of the demurrer turned on the sufficiency and formality of the return, I should hesitate before giving it sanction in the form here interposed. As regards that part of the return that sets up an abandonment of the case by the relator, the record stands thus:—The alternative writ is tested the second Tuesday of July, 1859, returnable the third Tuesday of August then next; the answer avers that the case and exceptions were abandoned by an order entered on the 10th of October following; the plea sets up that such order was, on the 24th day of the same month, set aside, whereby the order of October 10th became inoperative; and to this plea the defendant demurred. So, regarding the writ as the commencement of the action or

The People *on rel.* Adams *a.* Baker.

proceeding, the matter set up in both answer and plea, arose *pendente lite*. Such matters were always competent to be pleaded, and under the practice before the Code, which is still applicable to proceedings by mandamus (*Code*, § 471; 32 *Barb.*, 473), might be pleaded *puis darrien* after issue. (2 *Den.*, 321.) This practice still prevails. (9 *How. Pr.*, 568.)

The parties, therefore, had a right to interpose these matters by answer and plea. Besides, on this point they stand alike on the record, for the matter set up by the defendant in his answer, as well as that averred by the relator in his plea in reply thereto, arose *pendente lite*.

But it has been found that the alternative writ is fatally defective; that it does not set forth facts sufficient to entitle the relator to the relief he claims. Judgment must, therefore, be given against the relator on the demurrers, but of course for one bill of costs only on both demurrers. I find no precedent allowing the writ to be amended after return and demurrer thereto.

It may be amended at any time before it is returnable (6 *Mod.*, 133); but, according to the old practice, not afterwards. (4 *Toun.*, 690.) This rule is supposed still to prevail. (5 *Abbotts' Pr.*, 241.) But I think this decision, in the last case cited, was made without considering the purpose and effect of the statute permitting amendments of pleadings and proceedings, the provisions of which extend to writs of mandamus. (2 *Rev. Stat.*, 424, § 10; 3 *Id.*, 723, 5 ed., § 10.) These provisions are not abrogated by the Code. (22 *Barb.*, 137.) In this case, however, the relator would gain little by amending, as a new writ would doubtless be granted on due application. The first being adjudged informal and insufficient, and an amendment would be allowed only on terms.

Judgment for the defendant on the demurrer.

Van Ness *v.* Bush.VAN NESS *v.* BUSH.*Supreme Court, Fourth District; General Term, May, 1860.*

PLEADING.—AMENDMENT.—EVIDENCE.

The judge or referee before whom a cause is tried may allow the pleadings to be amended to any extent, in furtherance of justice, even to permit the setting up of an entirely new defence without costs.

The appellate court can review such an exercise of discretion, only so far as to ascertain whether it was in furtherance of justice or not.

Under the common general interrogatory, requiring a witness to state any thing known to him material to the issue, *or* to the benefit of the party interrogating, the witness may state a fact material to the issue, though to the detriment of such party.

Evidence of the declarations of a witness is inadmissible to contradict him, until he has been afforded an opportunity to explain them. This rule applies to witnesses examined by commission, as well as to others.

Every witness, a party as well as any other, must be allowed to show that he was mistaken in previous admissions or statements which are used to discredit him.

A party to an instrument for the payment of money is not estopped, by his mere refusal to pay it, based solely on the ground of inability, to a person then in possession thereof, from showing that it was not legally binding upon him.

Appeal from a judgment entered on the report of a referee.

This action was founded upon a promissory note of \$200, made by defendant, and payable to Isaac Bush, or order, ninety days after date, and dated July 17, 1852. The note was indorsed by Isaac Bush, and by him transferred to plaintiff, about the 12th or 14th of December, 1857.

The defendant's original answer, under oath, Dec. 28, 1857, denied the allegation in the complaint, that defendant had not paid said note, &c., and alleged that Isaac Bush was the owner of the note until it arrived at maturity, and that at or about the time of its maturity the defendant paid the amount thereof to the said Isaac Bush.

Upon this issue the cause went to the May circuit, 1858, and was there referred to George Yost, Esq., as sole referee. A commission was procured by defendant to take the depositions of Isaac Bush, in Illinois, and the commission was returned to the referee in October, 1858. The cause came on for trial Feb. 28, 1859, at which time the defendant moved for leave to amend

Van Ness *v.* Bush.

his answer so as to aver that the note was an accommodation-note, made by defendant for Isaac's accommodation, in which defendant had no interest; that said note was afterwards indorsed and discounted for Isaac Bush, and paid and taken up by him at maturity, and long after then transferred by him without consideration to plaintiff.

The referee allowed the proposed amendment, without costs to plaintiff, under plaintiff's objection.

There was evidence that Isaac Bush urged the note on plaintiff, and represented that it was *good*. About November 15, 1857, plaintiff took the note in his possession, but paid no money on it then. Shortly after that plaintiff saw defendant and demanded the money on the note and showed it to him. Defendant made no objection to the note; said he had no money. About the 21st of November, 1857, defendant, knowing that plaintiff had the note in his hands, told one Milligan that if he got the note it would be all right: and when Milligan asked defendant if there were any claims against the note, he said he had about \$40 of claims against it, and desired Milligan to get the note and wait on him for it.

Finally, between the 10th and 14th of December, 1857, plaintiff paid Isaac for the note. About the 14th of December, plaintiff saw defendant and asked him to pay the note or settle it up; defendant again replied he had no money; plaintiff then asked him if he had any offsets against the note; defendant replied, "I guess I have;" plaintiff asked what they were, and defendant made no reply. When plaintiff told defendant he should prosecute, defendant made no reply. Finally, the defendant makes, under his own oath, his answer to the complaint, wherein he claims, as a defence, the "payment of the note to Isaac."

The referee found that the note was an accommodation-note, and ordered judgment for defendant. From that judgment this appeal was brought.

H. C. Adams, for the appellant.—I. The referee erred in allowing the defendant to substitute a new answer; because the issue of payment of the note, presented by the defendant's original answer, was the only issue referred to him. He had no power to allow a new answer, presenting an entirely

Van Ness *a.* Bush.

different issue from the one referred to him. The last clause of section 173 of the Code is a complete negative to the power of any court to change, upon the trial, the substance and nature of an issue to the extravagant extent exercised by the referee in this case. (Catlin *a.* Hansen, 1 *Duer*, 309; Fagan *a.* Davison, 2 *Ib.*, 153.) The amendment, if allowed at all, should have been upon payment of costs to that time. (Chapman *a.* Webb, 6 *How. Pr.*, 390; Lane *a.* Beam, 1 *Abbotts' Pr.*, 65.)

II. The referee erred in allowing the answer to the last interrogatory, which called for evidence tending to the benefit of plaintiff, when the answer was directly against the plaintiff.

III. The referee also erred in allowing the evidence of defendant, "that he was mistaken in his first answer, when he stated that he had taken up the note and had paid the amount to Isaac Bush." A party cannot be allowed to prove his ignorance or culpability as an excuse against a recovery.

IV. It was shown by positive evidence, that before and after the note was transferred to plaintiff, the defendant recognized the note as valid against him. He is, therefore, estopped from any defence against the note: 1. By his silence when he saw it in the hands of a *bona-fide* holder who demanded payment, asked information, and threatened to prosecute him; 2. By his admissions, express and implied, and by his open and general conduct, which must be considered as addressed to every one who may have had occasion to act upon them. (1 *Greenl. Ev.*, §§ 197, 207.)

V. The finding of the referee that the note was an accommodation-note, &c., and his conclusion and order thereon, were against law and evidence.

James Genter, for respondent.

BY THE COURT.—ROSEKRANS, J.—The defendant, in his original answer, put in issue, first, the transfer of the note mentioned in the complaint by the payee to the plaintiff; and, secondly, averred that the payee was the owner of the note until its maturity; and that while he was such owner, and before it was transferred to the plaintiff, the defendant paid it to the payee.

On the trial he applied to the referee to amend his answer, by setting up that the note was made by him for the accom-

Van Ness *a.* Bush.

modation of the payee, and was taken up by the payee at maturity, and was subsequently delivered by the payee to the plaintiff, without consideration. The referee allowed this amendment, without costs.

I. The plaintiff insisted that the referee had not the power to allow the proposed amendment; that it changed the substance and nature of the defence, and was wholly inconsistent with the original answer. The objections were overruled, and the plaintiff excepted.

We think the objections were properly overruled. Section 173 of the Code provides that the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading by correcting a mistake in any respect, or by inserting other allegations material to the case.

This language would seem to remove all restrictions upon the power of amendment of pleadings upon the trial, in cases in which it is made to appear to the court that the amendment would be in furtherance of justice. This was the construction given to this section by HARRIS, J., in the case of *Beardsley a. Stover* (7 *How. Pr.*, 294). In *Harrington a. Slade* (22 *Barb.*, 161), the general term in this district held substantially the same doctrine. PAIGE, J., says that, "Under the old chancery practice, amendments of answers, and leave to put in supplemental answers, were granted with great caution; that the defendant was not allowed to put in a supplemental answer contradicting the statements in the first answer; but that amendments were now granted with more liberality, and that under the provisions of the Revised Statutes and the Code, it is the duty of the court to allow amendments in furtherance of justice, upon such terms as shall be just and proper."

The cases of *Catlin a. Hansen* (1 *Duer*, 309), and *Fagan a. Davison* (2 *Id.*, 153), so far as they conflict with this construction of section 173 of the Code, are not, in our opinion, correct.

The Court of Appeals, in the case of the *Cayuga County Bank a. Warden* (6 *N. Y.*, 19, 27), held that an amendment without costs, was an amendment "upon such terms as may be proper within the meaning of the section referred to."

The terms of an amendment are by this provision clearly within the discretion of the court, and the exercise of that discretion is not the subject of review upon exceptions or appeal.

Section 272 of the Code gives a referee the same power to allow amendments to any pleading as the court upon a trial, upon the same terms and with the like effect.

II. There is no force in the plaintiff's objection to the answer of Isaac Bush to the last direct interrogatory. That interrogatory asked the witness, "if he knew or could state any other matter or thing material to the subject of his examination, or which might tend to the benefit of the plaintiff." The answer was responsive to the first branch of the question, and was material to the issue tendered by the amended answer, which alleged that the note was delivered by the payee to the plaintiff without consideration, and also to the issue tendered by the first answer, that plaintiff was not the real owner and holder of the note.

III. The referee properly excluded the evidence offered of the declarations of Isaac Bush, that he had received a consideration for the note from the plaintiff. The testimony was offered for the purpose of contradicting the testimony of Isaac Bush, and to affect his credibility; and the objection to it was, "that the attention of the witness had not been called to the conversation," and was sustained.

It is settled by the case of *Brown v. Kimball* (25 *Wend.*, 259), that the declarations of witnesses whose testimony has been taken on commission, made subsequent to the execution of the commission, contradicting or invalidating their testimony, cannot be given in evidence; and that such evidence is always inadmissible, unless the witnesses have been examined upon the point, and an opportunity offered them for explanation or exculpation, and that the rule applies as well where the testimony is taken under a commission as otherwise. The same doctrine was held in *Stacy v. Graham* (14 *N. Y.*, 492).

The referee also properly allowed the defendant to explain the inconsistency of his testimony with his first answer. The plaintiff had introduced the first answer in evidence to impeach the defendant's testimony. Clearly, the defendant's mouth could not be closed, and he thereby prevented from showing that it was put in through forgetfulness of the facts and by mistake, and not corruptly.

The other questions in the case were purely questions of fact for the referee, upon a conflict of evidence. His finding is conclusive.

Coleman v. Bean.

IV. There was no sufficient evidence upon which the referee could hold, as matter of law, that the defendant was estopped from setting up the defence that the note was made for the accommodation of his brother, and was taken up by him at maturity, and afterwards transferred to the plaintiff. The only evidence upon which it could be claimed that the estoppel arose, was the answer of the defendant to the plaintiff's demand of payment of the note made on the 10th or 15th of November, 1857, that he "had no money." But clearly this answer was not made with a view of influencing the plaintiff to purchase the note; on the contrary, the plaintiff testified that he then had the note in his possession, and showed it to the defendant, and told him that he (plaintiff) had a note against him.

It is one of the essential elements of an estoppel *in pais*, that the declaration out of which it is claimed to arise, should be made with a view to induce the party to whom it is made to act upon it.

The judgment should be affirmed.

COLEMAN v. BEAN.

New York Common Pleas; General Term, July, 1861.

RECITALS IN UNDERTAKING.—ESTOPPEL.—FRAUD.

Those who execute an undertaking are estopped from contradicting its recitals to defeat the instrument.

In an action upon an instrument in the form of the undertaking required by the Code (§§ 240, 241) to be given on the discharge of an attachment, reciting the commencement of an action, the issuing of the attachment, and the making of application for its discharge;—*Held*, that the subscribers to the undertaking should not be allowed to show that recitals were untrue.

Evidence of fraud on the part of persons other than plaintiff, without his privity, in procuring the execution of the instrument sued upon, is properly rejected.

Appeal from a judgment.

This was an action upon an undertaking which was entitled, in an action brought by the present plaintiff against the Gal-

Coleman a. Bean.

veston, Houston, & Henderson Railroad Company, and was as follows:

[Title of the cause.]

An attachment having been issued in the above action to the sheriff of the city and county of New York, and the above-named defendant having appeared in such action, and being about to apply to the officer who issued such attachment or to the above-mentioned court for an order to discharge the same: We, Joseph B. Wheelock, of No. street, in the city of, and A. H. Bean, of No. street, in said city, do hereby, pursuant to the statute in such case made and provided, in consideration of one dollar to each of us in hand paid, undertake, in the sum of thirteen hundred dollars, that we will, on demand, pay to the above-named plaintiff, the amount of the judgment which may be recovered against the above-named defendant in this action, not exceeding the above-mentioned sum.

Dated New York, December 21, 1857.

JOSEPH B. WHEELOCK. [L. s.]

A. H. BEAN. [L. s.]

The plaintiff recovered judgment against the railroad company for \$775.28.

The answer of Bean in the present action denied the delivery of the undertaking; averred that its execution by him was procured by means of false and fraudulent representations; that in order to induce defendant to sign the undertaking, it was falsely and fraudulently represented to him that an action had been commenced in the Supreme Court of the State of New York, in favor of the plaintiff, against the Galveston, Houston, & Henderson Railroad Company, in which a warrant of attachment had been issued against the property of the company as a foreign corporation, and that under and in pursuance of the warrant, the sheriff had levied upon and taken into his possession property of the corporation of great value, and that in order to relieve the property from levy and seizure, and to restore the same to the possession of the company, it was requisite to execute an instrument of the kind and tenor set forth. That confiding in the truth of the representations so made, and be-

Coleman v. Bean.

believing the same to be true, he signed the instrument. That the representations so made were false and untrue, and that neither at the time of the commencement of the action against the company, nor at any time subsequent, had any warrant of attachment been issued to the sheriff against the property of said Galveston, Houston, & Henderson Railroad Company in said action, nor had the sheriff levied upon or seized any property of the corporation in pursuance of any such warrant or otherwise. That neither at the time of the commencement of said action, nor at any time since, had the railroad company any property within this State subject to levy and seizure under attachment, or upon which plaintiff could have made levy under any warrant, had one been issued. That the signing of the instrument was wholly without consideration and void, and that no obligation was thereby created or imposed on defendants. That no application was ever made for the discharge of any warrant of attachment in favor of plaintiff against the corporation. That the statements in the instrument annexed to said complaint, to the effect that an attachment had been issued to the sheriff of the city and county of New York in the action of plaintiff against said company, and that an application was about to be made to the officer issuing the same for the discharge thereof, were wholly without foundation, and so known to be to the plaintiff, when defendant was induced to sign the instrument.

Upon the trial of the action, defendant Bean offered to prove, that in order to induce the defendants to execute the instrument, the secretary of the said company, falsely and fraudulently stated, that in the former action a warrant of attachment had been issued to the sheriff of the city and county of New York, against the property of the company as a foreign corporation, and that under the warrant the sheriff had seized and taken into his possession a large amount of property, and that in order to release the property, and to restore the same to the possession of the company, it was necessary that defendant should execute such instrument, and that the defendant Bean, confiding in the truth of said statements and representations, was induced to execute said instrument, and that the said representations and statements were false, and were made with fraudulent intent.

Coleman *a.* Bean.

The court excluded the testimony, and to this the defendant excepted.

Defendant offered to prove, that the consideration therein expressed was not paid, or agreed to be paid. That the secretary and managing agent of the company made the representations and statements in the preceding offer mentioned, and asked the defendant Aaron H. Bean to execute the said instrument, and that the defendant Bean thereupon, and without any considerations whatever, executed the instrument and delivered the same to the secretary.

The court excluded the testimony, and each part thereof, and the defendant excepted.

The defendant offered to prove, that the said secretary and managing agent applied to the defendant Bean to execute the instrument, and in order to induce the defendant Bean to execute the same, made the representations and statements in the first offer made, and that the said defendant Bean thereupon executed said instrument, and that no attachment was in fact at any time granted or issued in the said action.

The court excluded the testimony, and defendant excepted.

The defendant offered to prove, that no attachment was issued or granted in the said action, and that no property of the said company had been seized under any attachment, and that no application was made to discharge any attachment against the said company.

The court excluded the testimony, and defendant excepted.

The plaintiff recovered judgment for \$982.29. The defendant Bean appealed to the general term.

John E. Burrill, for the appellant.—I. The instrument on its face purported to have been executed in pursuance of the provisions of the statute, and the complaint alleged that it was executed and delivered as a proceeding in the action. The offer of the defendant was to show that there was no authority to take or receive the instrument, and that as a statutory security it was a nullity. (*Code*, §§ 240, 241.)

II. The defendant was not estopped by the recitals in the undertaking from proving that an attachment had been issued or served. 1. The plaintiff did not do any act, or take any step in reliance upon the undertaking. (*Cadwell a. Colgate*, 7 *Barb.*,

Coleman *a.* Bean.

253; *Dezell a. Odell*, 3 *Hill*, 215.) 2. The fact whether an attachment had been issued or not was within the knowledge of the plaintiff, and not within that of the defendant. 3. The distinction between the cases where an obligor has been held to be estopped, and the present, is shown in the following cases: *Cadwell a. Colgate* (7 *Barb.*, 253); *Bowne a. Mellor* (6 *Hill*, 496); *Homan a. Brinckerhoff* (1 *Den.*, 184). 4. The defendant offered to show that the representations made to him that an attachment had been issued were false, and made with fraudulent intent. In such case no estoppel could arise.

III. The defendants offered to show that false and fraudulent representations in regard to the issuing and levy of the attachment had been made by the secretary of the company, and that confiding therein, and influenced thereby, and without any consideration, they executed the instrument, and delivered the same to the said secretary. This offer was erroneously excluded. 1. The rule is, that in all cases and classes of instruments, one may show that he was induced to execute the instrument by fraud. 2. The secretary of the company was the agent of the plaintiff to obtain the security. 3. The circumstances under which the plaintiff took the instrument, in connection with the false recitals contained in it, were sufficient to charge the plaintiff with participation in it.

IV. There is no consideration expressed in the instrument, and the defendant offered to prove that there was no consideration whatever for its execution. 1. The instrument does not allege any consideration for the instrument, independent of the consideration named by the statute. 2. It is not averred to have been done pursuant to statute, and in consideration of one dollar.

Albert Mathews, for the respondent.—I. By giving the undertaking, the defendant is estopped from contradicting the facts recited and contained in it. (*Haggart a. Morgan*, 4 *Sandf.*, 198; 5 *N. Y.*, 422; *Franklin a. Pendleton*, 3 *Sandf.*, 572; *Decker a. Judson*, 16 *N. Y.*, 439.) 1. The preliminary proceedings, and issuing attachment, &c., are well pleaded by setting forth the undertaking; and well proved by the production or admission of contents of the original. (*Franklin a. Pendleton*, 3 *Sandf.*, 572; *Slack a. Heath*, 4 *E. D. Smith*, 95; *Shaw a. To-*

Coleman a. Bean.

bias, 3 *N. Y.*, 188.) 2. The defendant cannot contradict the consideration expressed upon the face of the undertaking for the purpose of defeating it. (*McCurtie a. Stevens*, 13 *Wend.*, 527; *McCrea a. Purmort*, 16 *Ib.*, 460; *Bank of U. S. a. Housman*, 6 *Paige*, 526; *Meriam a. Harsen*, 2 *Barb. Ch.*, 232, 267; *Barnum a. Childs*, 1 *Sandf.*, 58; *Decker a. Judson*, 16 *N. Y.*, 439; 3 *Cow. & Hill*, 1438.) 3. The defendant cannot contradict the recitals in the undertaking. (*Ring a. Gibbs*, 26 *Wend.*, 502; *Loomis a. Brown*, 16 *Barb.*, 325; *Morange a. Mudge*, 6 *Abbotts' Pr.*, 243; *Decker a. Judson*, 16 *N. Y.*, 439; *Sumner a. Glancy*, 3 *Blackf.*, 361; *Trimble a. State*, 4 *Ib.*, 435; *May a. Johnson*, 3 *Ind.*, 449; *Guard a. Bradley*, 7 *Ib.*, 600; *Allen a. Luckett*, 3 *J. J. Marsh.*, 164; *Kellog a. Becker*, 4 *Ib.*, 655; *Stockton a. Turner*, 7 *Ib.*, 192; *Stow a. Wyse*, 7 *Conn.*, 214; *Hunter a. Miller*, 6 *B. Munroe*, 612.)

II. The defendant having given the undertaking, and the plaintiff having accepted it, the plaintiff thereby being debarred the right to issue an attachment (other than the one described in the undertaking), the above was sufficient to sustain the undertaking, and the parties were mutually estopped thereby. (*Shaw a. Tobias*, 3 *N. Y.*, 188; *Dezell a. Odell*, 3 *Hill*, 215.)

1. No representations made by the corporation to the defendant could affect his liability to the plaintiff. 2. The acceptance by the plaintiff of this undertaking, in lieu of attaching the property of the corporation, was a valid and sufficient consideration to sustain the instrument as a voluntary obligation. (*Winter a. Kinney*, 1 *N. Y.*, 365; *Decker a. Judson*, 16 *Ib.*, 439.)

BY THE COURT.*—HILTON, J.—The instrument sued upon was an undertaking in the form required by statute to be given on the discharge of an attachment (*Code*, §§ 240, 241), and on account of the deliberation implied by its nature, should be judged by the rules of law applicable to instruments under seal.

It recited, that in a certain action against the Galveston, Houston, & Henderson Railroad Company, an attachment had been issued, and an application was about being made by the company to discharge the same. The defendants thereupon, pursuant to the statute in such case made and provided,

* Present, DALY, F. J., BRADY and HILTON, JJ.

Coleman v. Bean.

in consideration of one dollar to each in hand paid, undertook in the sum of \$1,300 that they would pay on demand, to the plaintiff, the amount of the judgment which might be recovered against the company in that action, not exceeding the sum specified.

These recitals estopped the defendants, and the judge at the trial very properly refused to allow evidence tending to contradict them for the purpose of defeating the instrument. (*Wood v. Chapin*, 13 *N. Y.*, 509; *Decker v. Judson*, 16 *Ib.*, 439; *Rowntree v. Jacob*, 2 *Taunt.*, 141; *McCosky v. Leadbeater*, 1 *Kelley (Ga.)*, 551; *Tubbs v. Lynch*, 4 *Harring*, 521; *Vangine v. Taylor*, 18 *Ark.*, 65; *Farrington v. Barr*, 36 *N. H.*, 86; *Belden v. Davies*, 2 *Hall*, 433, 447, and cases cited; *Hayes v. Askew*, 5 *Jones' Law R. (N. C.)*, 63; *Sinclair v. Jackson*, 8 *Cow.*, 543, 585; *Oakley v. Boorman*, 21 *Wend.*, 588; *Fisher v. Smith*, *Moore R.*, 569; *Jackson v. Alexander*, 3 *Johns.*, 484, 493; *Barnum v. Childs*, 1 *Sandf.*, 58.) The rule being, that where the recitals in the instrument are material, the party shall be estopped (*Shelly v. Wright*, *Willes R.*); and here they were certainly material, as they constituted the very foundation for the undertaking. (2 *Leon.*, 11.) Its production, therefore, at the trial, was sufficient evidence of the facts recited in it. (*Shaw v. Tobias*, 3 *N. Y.*, 188; see, also, 1 *Phill. on Ev. by Edwards*, 471; 4 *Kent*, 260, note; 2 *Black.*, 295; *Goodtide v. Bailey*, *Comp.*, 601; *Nash v. Turner*, 1 *Esp.*, 217; *Bowman v. Taylor*, 2 *Ad. & E.*, 278.) In the latter case, the instrument recited that the plaintiff had invented a certain improvement in the construction of looms, for which he had obtained letters-patent, and had agreed to permit the defendants to have the benefit and use of the invention for a certain price to be paid for each loom. The action was brought to recover the price which the defendants thus agreed to pay, and the plea interposed by way of defence was, that the plaintiff was not the true inventor of the improvement; but upon demurrer the court held that the defendants were estopped by the recital, and could not be permitted to deny what they had asserted by their solemn instrument. (*Lainson v. Tremore*, 1 *Ad. & E.*, 792.)

The offer at the trial to show fraudulent representations made to the defendants by the secretary of the company, to induce the defendants to sign the undertaking, was also properly rejected

Mather's Case.

by the judge, as it was not pretended that the plaintiff in any way participated in making them, or knew of their having been made. The secretary, in procuring the undertaking, acted in behalf of the company, and his representations while so acting could not operate to the plaintiff's injury, unless the plaintiff was shown to have been privy to the deception alleged to have been practised.

Judgment affirmed.

MATHER'S CASE.

Supreme Court, First District; At Chambers, March, 1862.

DISCHARGE UNDER FOURTEEN-DAY ACT.—POWER OF JUSTICE AT CHAMBERS.

An application for the discharge of a judgment-debtor from imprisonment on execution against the person—under 2 Rev. Stat., 31, § 1 (amended, 1847, ch. 390, § 1)—must be made to the court. A judge out of court has no jurisdiction of such matter.

Application for a discharge from imprisonment, under the Fourteen-day Act.

The defendant Mather had been arrested under an execution against the person, upon a judgment for \$1,536.68. After remaining in custody, upon the limits, for three months, he gave notice of application for his discharge from imprisonment, under 2 Rev. Stat., 31, as amended in 1847. His petition was addressed "To the Justice of the Supreme Court, of the State of New York,"—his notice of application stated that the application was to be made to a justice of the Supreme Court, at chambers, on the first Monday of February. On this day the petitioner appeared. The creditor, under whose execution he was held, raised no objections to the form of the application, but claimed the right of examining the petitioner and other witnesses as to the petitioner's property. At the conclusion of the examination, the creditor opposed the discharge, on the ground,

Jarvis a. Felch.

that certain transfers of the petitioner's property were fraudulent as against creditors.

Cornelius Fiske, for the petitioner.

Benjamin Vaughan Abbott, for the judgment-creditor.

INGRAHAM, P. J.—There is a fatal objection to these proceedings which cannot be obviated, and, although not made by the creditor's counsel, cannot be overlooked as going directly to the jurisdiction.

The notice of application for a discharge is, that it will be made to a justice of this court at chambers. A justice out of court has no authority to grant, in such a proceeding, a discharge.

The statute (3 *Rev. Stat.*, 5 ed., 105) says, that the debtor may petition the court from which the process issued, &c.

The application must be to the court, and not to a judge out of court: he has no authority, and no jurisdiction in the matter.

Independent of this objection, I see nothing in the evidence to prevent the discharge. The sale of stock is, perhaps, not altogether free from suspicion; but as the purchaser thinks himself able to pay the notes, and as the debtor's interest in them would pass to his assignee, I do not think the facts proven sufficient to prevent the discharge; but as the proceeding is void for want of jurisdiction, I must deny the application, without prejudice to renewing it in a proper manner.

Application denied.

JARVIS a. FELCH.

New York Superior Court; At Chambers, January, 1862.

ABATEMENT.—DEATH OF SOLE PLAINTIFF.

The death of a sole plaintiff suspends all further proceedings until there is a revival by the personal representatives of the deceased, so that no step can be taken in the action until it has been continued by the order of the court.

Jarvis *a.* Felch.

A dismissal of the complaint, taken by default, after the death of a sole plaintiff, but without notice of his death, is irregular, and will be set aside.

Motion to set aside, for irregularity, an order dismissing the complaint.

This was an action upon a promissory note. In August, 1860, the plaintiff died. No order was entered continuing the action in the name of the representatives of the plaintiff. In January, 1861, the defendant, not having been apprised of the death of the plaintiff, took an order dismissing the complaint upon default. The plaintiff's attorney makes the present motion.

Edward Hoffman, for the motion, cited *Ridgway a. Bulkley* (7 *How. Pr.*, 267.)

Burger & House, opposed.

MONELL, J.—By section 121 of the Code it is provided that no action shall abate by the death of a party; but the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by the representative. The death of a sole plaintiff, although it does not, in the language of the Code, "abate" the action, suspends all further proceedings until there is a revival by the personal representative of the deceased; so that no step can be taken in the further prosecution of the action until it has been continued by the order of the court. It is the duty of the plaintiff's representative to apply to the court for leave to continue the action; and in default of his doing so, the defendant may obtain an order to compel such action on the part of the plaintiff's representative. He cannot move to dismiss the complaint for want of prosecution. This is in analogy to the practice of the late Court of Chancery (1 *Barb. Ch.*, 244, 676), where it was held that an order dismissing the complaint for want of prosecution, was irregular.

The course of the defendant, if he wishes to proceed with the case, is, to obtain an order requiring the action to be continued in the name of the personal representative of the plaintiff, or to show cause why the complaint should not be dismissed. The dismissal of the complaint, therefore, in this action, was irregular, and must be set aside. But as it appears by the affidavit of

Fielden *v.* Lahens.

the defendant's attorney, that he was not aware of the plaintiff's death, when he moved the dismissal of the complaint, the motion is granted without costs.

FIELDEN *v.* LAHENS.

New York Superior Court; At Chambers, January, 1862.

SETTLEMENT OF CASE.

The settlement of a case is a judicial and not a ministerial act.

Where, on appeal from the determination of three referees, the case was settled by two of the referees in the absence of the third, and without notice to him ; —*Held*, irregular, and that the case must be sent back for resettlement.

Motion to set aside the settlement of a case as irregular, and to send it back to the referees for resettlement.

This was an action of assumpsit, commenced in 1844. The action was delayed by the execution of commissions in Europe, and other causes, until April, 1854, when the issues were referred to three referees to hear and determine.

The referees dismissed the complaint. The plaintiffs excepted to the report of the referees, both to the findings of fact and conclusions of law ; and having appealed to the general term of this court, prepared and served a case or exceptions, upon which to move for a new trial. The defendant's attorneys prepared and served amendments to the proposed case, requiring the incorporation into the case of a large body of evidence, claimed to have been omitted, and to be necessary in the presentation of the whole case to the appellate court. Notice of settlement of the case by the referees was duly given, and two of the referees met and settled the case, rejecting all, or nearly all, of the amendments proposed by the defendant's attorney and counsel. The third referee, who was present on the trial and decision of the case, was not present, and did not participate or concur in the settlement of the proposed case and

amendments, and did not know of the settlement, until after the same had been completed and filed.

A motion was now made to set aside the settlement of the case as irregular, and to send it back to the referees for resettlement.

William W. Vanwagenen and *T. James Glover*, for the motion.
Jer. Larocque, opposed.

MONELL, J.—The Revised Statutes (2 *Rev. Stat.*, 384, § 46), require that all the referees shall meet together and hear all the proofs and allegations of the parties, but a report by any two of them is valid. In all proceedings, therefore, connected with the trial before referees, all the referees must be present, not only to hear the proofs and allegations of the parties, but in their deliberations upon the evidence, and in making up their report.

It becomes, however, a question, whether the same necessity exists for all the referees to be present, in the settlement of a case and amendments, upon which it is proposed to review their decision. The early practice, in motions to set aside the reports of referees, was, for the moving party to prepare and serve an affidavit of the evidence and proceedings before the referees: the opposing party, if dissatisfied therewith, prepared a counter-affidavit, and upon these affidavits the motion was heard. The court had the power to require the referees to report their decisions in admitting or rejecting evidence, and all the proceedings and testimony before them. (2 *Rev. Stat.*, 384, § 47.) At a later day, the Supreme Court, by rule, provided that, upon affidavits being served, either party might give notice of appearance before the referees, for the purpose of settling the facts. The referees, on being served with the affidavits, made a full report of the evidence, and their proceedings on the reference. Such report was conclusive evidence of the facts stated, and upon it the motion to set aside the report had to be determined. By the Code, the decision of referees is to be reviewed in the same manner as the decision of the court. The party desiring a review, either of questions of fact, or of law, must make a case or exceptions. The opposite party may propose amendments, and the case and amendments must be settled by the referees. (*Johnson v. Whitlock*, 13 *N. Y.*, 344.)

What then is a settlement of a case? Is it a mere ministerial act, or is it so far judicial, or quasi judicial, as to suppose or require the decision or determination of the mind upon some matter or thing? Frequently, amendments demand the insertion of evidence claimed to have been omitted, or to strike out other erroneously inserted, or to correct the evidence as stated, or to insert or strike out exceptions or rulings of the referees. If the determination of these various questions is the mere effort of the memory, as to whether they did or did not occur on the trial, and requires no exercise of the mind, it may be that the act is purely ministerial in its character. But I cannot bring myself to believe that the passing upon disputed questions, as to whether evidence was or was not given, partakes of no quality constituting it a judicial act. If it is a judicial act, all the referees must be present to participate in the judicial decision. And even if it is the act of memory alone, it is equally necessary, that the memories of all should be taxed, to approximate to a correct result.

Formerly, counsel were allowed to appear before the judge upon the settlement of a bill of exceptions, and argue for or against the amendments. (*Root v. King*, 6 *Cow.*, 569.) If to argue, then there was something to decide; something more than for the judge to refer to his notes, and allow or disallow the amendment.

In *Morss v. Morss* (11 *Barb.*, 510), PARKER, J., says, "Referees act in the place of judge and jury. They are to decide all questions, as well of law as of fact, that arise on the trial." The question was, whether one of three referees could be examined as a witness on the trial. The learned judge holds, that all the referees are necessary to constitute the court. And, at p. 515, he says, "Two-thirds of a court cannot form a legal tribunal. The party has the right to three judges, the number prescribed by statute."

Without pursuing the subject further, I am fully satisfied that the act of settling a case is judicial and not ministerial, and that a party has the right to require the presence of all the referees, and that a settlement by two only is irregular, ‘

The case must, therefore, be sent back for resettlement. Costs to abide the event.

Brush *a.* Kohn.

BRUSH *a.* KOHN.*New York Superior Court; At Chambers, January, 1862.*

REVIEWING MISDIRECTION OF JUDGE AT TRIAL.—MOTION TO CORRECT VERDICT.

A motion to correct a verdict, on the ground of a misdirection of the judge, must be founded on a case made.

Where a plea of tender was interposed, and money paid into court, and the jury found the tender sufficient; and, under instructions from the court, rendered a verdict for the plaintiff for the amount paid into court;—*Held*, that a motion to correct the verdict, and to enter judgment for the defendant, could be heard only on a case made.

Motion to correct a verdict.

The defendant alleged, in his answer, a tender before suit. With his answer he brought the amount tendered into court. The action was on a parol demise, which the plaintiff averred terminated on the first of May. This was denied by the defendant, who alleged that the demise terminated on the first of January. The judge directed the jury, that if they found the demise terminated as the plaintiff claimed, he was entitled to a verdict for the rent up to the first of May, some \$500; but if they should find the demise ended on the first of January, their verdict should be for the plaintiff for the rent due on that day, being the amount tendered and paid into court. The verdict was for the plaintiff for the amount paid into court. The defendant now contended that the latter direction of the judge was erroneous; and that he should have directed the jury, if they found that the demise terminated on the first of January, and the rent to that time amounted to no more than the sum tendered and paid into court, their verdict should have been for the defendant.

I. T. Williams, for the motion.

J. M. Van Cott, opposed.

*affirmed
9 Bohn. 589.*

Brush *a.* Kohn.

MONELL, J.—So well satisfied am I that I have not the power on this motion to correct the verdict in this case, that I have not deemed it necessary to examine the question of the alleged error in the direction of the judge.

Under the practice before the Code, where a verdict was for the plaintiff which should have been for the defendant, the remedy of the defendant was by a motion in arrest of judgment. (Bellows *a.* Shannon, 2 *Hill*, 86.) He could not move for judgment *non obstante veredicto*. (Smith *a.* Smith, 4 *Wend.*, 468.) The plaintiff only was allowed to make such a motion.

The motion in arrest of judgment was an enumerated and not a non-enumerated motion (Schermerhorn *a.* Schermerhorn, 5 *Wend.*, 513), and hence could only be brought on on a case. (Belden *a.* Davies, 2 *Hall*, 433.) In *Bank of Columbia a.* Southerland (3 *Cow.*, 336), to which I was referred by the defendant's counsel, the motion was that judgment be entered for the defendant. There was a tender, money paid into court, and a verdict for the amount for the plaintiff. The court say: "It is irregular to come in this form. Like all other questions arising on the trial, which relate to the direction of the judge, or points reserved there, it should be brought here on a case made." Time was given to make a case.

So far from the practice being changed in this respect by the Code, it is now expressly provided, that errors occurring on the trial can be reviewed only on a case or exceptions; and, unless directed to be heard in the first instance at the general term, must be brought on at a special term. (*Code*, §§ 264, 265.) Such errors, reviewable only on a case, include a misdirection of the judge. (Alston *a.* Jones, 17 *Barb.*, 276; Storey *a.* Brennan, 15 *N. Y.*, 524.) And whether such misdirection be mere error in submitting questions to the jury upon which the law is too well settled to admit of doubt, or grave questions on which the law is unsettled, does not, in my judgment, change the practice or enlarge the power of the court.

The motion must be denied, but without costs.

HAY'S CASE.

Supreme Court, First District; At Chambers, January, 1862.

VACATING ASSESSMENT.—LEGAL IRREGULARITY.

On application to vacate an assessment for a local improvement in the city of New York, on the ground of fraudulent collusion between the street-commissioner and the contractor, in not awarding the contract to the lowest bidder, and in ascertaining and allowing the amount paid for work under the contract as made,—*Held*, that the fraud and irregularities complained of were not, “in the proceedings relative to the assessment,” within the meaning of Laws of 1858, ch. 338, which authorizes a party aggrieved by any fraud or irregularity in such proceedings, to apply to a justice of the Supreme Court to vacate the assessment.

“Legal irregularity” in an assessment for a local improvement in the city of New York, within the meaning of Laws of 1858, ch. 338, is an omission of, or irregularity in, one or more of the statutory steps required in laying the assessment.

Motions to dismiss two petitions to vacate an assessment for regulating and grading Second Avenue.

The petitioner Hay, being assessed \$1,500, in an assessment amounting, in the aggregate, to \$388,519, and upwards, for regulating and grading Second Avenue, presented his petition to have the assessment vacated as to him, on the grounds that the contract was not awarded to the lowest bidder, and that certain items were included in the assessment which he claimed were not included in the contract, and that therefore the assessment was fraudulent and “legally” irregular. It was not alleged that all the work charged for was not actually done, nor that the amounts assessed were not actually expended by the Corporation in making the improvement. The application was made under the law of April 17, 1858 (*Laws of 1858*, 574).

Henry H. Anderson, for the motions.—I. The act is unconstitutional. It is in violation of article 6, section 8, of the Constitution. It really creates a new office, that of examiner of the assessment lists which have been confirmed by the Common

Hay's Case.

Council. These duties, though judicial or quasi judicial in their character, are not devolved upon the Supreme Court as a court, nor upon the judges thereof as such; but the individual judges of the Supreme Court are designated by their official title to perform this duty at any place and any time, whether in special term or in vacation. (*Laws of 1858*, 574; *Striker v. Kelly*, 7 *Hill*, 9; *Heyburn's Case*, 2 *Dall.*, 104.) If the petitioner's construction be given to the act, it is an unconscionable act; it works a fraud upon the Corporation, and upon all tax-paying citizens. The 5th section, it is true, says that any lands may be reassessed; but if the position taken by counsel for the petitioner is correct, a valid reassessment could never be made, as the same objections might be urged against the next assessment, and so on, as often as an assessment should be laid. The Common Council, under the act of 1813, order such improvements as they may deem necessary to be made, and may cause the same to be done, and may assess the expense thereof upon the property benefited thereby. (*Act of April 9, 1813*, §§ 1, 270, 271; *Act of Feb. 21, 1824*, § 1.)

II. The petitioner is not a party aggrieved within the meaning of the act. We insist that the assessment made, by the act of 1813, binding and conclusive upon the owners of lots assessed upon confirmation or ratification by the Common Council, is in the nature of a judgment; and that if persons do not present their objections in writing, as provided by the act of May 7, 1841, they are estopped from afterwards saying that they object thereto, as the statute provides that "all persons who may be opposed to the same," may present their objections to this tribunal, who are to examine the objections. If they, then, deem it proper to alter their assessment, they may do so; if not, they send the objections to the Common Council, who are a kind of court of review as to such objections. If no objections are interposed, it is fairly to be presumed that all persons are contented, and therefore the law has made the assessment, when confirmed, conclusive. The contract made by the Corporation forms no part of the assessment. If the money is expended, it may be assessed. The object of the law is to reimburse the city treasury the moneys expended. The idea is to levy a local tax for the local improvement. It is not intended, at any time, to throw any part of the actual expense, whether

Hay's Case.

properly or improperly made, upon the general taxpayers. The whole expense, whether properly or improperly made, should be borne by the locality benefited by the work. Frauds and legal irregularities may occur, against which this law of 1858 seeks to provide. For example:—The assessors cannot assess beyond one half the distance to the next street or avenue. They cannot assess for more than one half the value put upon the property by the tax assessors. The assessors might omit to give the notice required by the law of 1841. A disregard of these laws would be a legal irregularity. The assessors might omit to give the notice required under the law of 1841, and might also assess, for the whole improvement, the property upon but one side of the street, while the brothers or relatives of the assessors might own all the property not assessed on the street equally benefited. Here would be a case of both fraud and irregularity. Against such cases this law might be considered as intending to provide. The parties assessed would have had no opportunity to make their objections, and would, therefore, be entitled to relief.

Gilbert Dean, opposed.

SUTHERLAND, J.—The petitioners complain that the contract for the work was not awarded to the lowest bidder, and that certain items were included in the assessment which were not included in the contract, and hence, that the assessment was irregular and fraudulent, within the act of April 17, 1858.

The point or gist of the complaint would appear to be, that in consequence of fraudulent collusion between the street-commissioner or city agent, and the contractor, and perhaps others, in awarding the contract, and in ascertaining and allowing work done under it, the petitioners have been assessed more than they ought to have been.

I am of the opinion that the fraud and irregularities complained of cannot properly be said to have been in the proceedings relative to the assessment, within the meaning of the act of 1858, and that the petitioners are not entitled to the summary remedy provided by that act. The contract for doing the work is no part or step of the assessment proceedings for paying for the work. These proceedings are regulated by statute, and to

Peet *a.* Cowenhoven.

be regular, all the statutory steps must be taken, and taken according to statutory requirement. An omission or irregularity of, or in, one or more of these statutory steps, would be, I think, a "legal irregularity" within the meaning of the act of 1858.

The formalities or conditions required by the city charter, or by general ordinance, in awarding or making all contracts for work, &c., are for the protection of the city Corporation in general, and do not relate to contracts for local improvements in particular.

I do not say that the petitioners are without remedy, by action or otherwise, for any fraud or irregularity in the making or execution of the contract for the work; but I am inclined to think that they are not entitled, in this case, to the summary and extraordinary remedy furnished by the act of 1858.

The motions to dismiss the petitions are therefore granted, but without costs.

PEET *a.* COWENHOVEN.

Supreme Court, First District; At Chambers, December, 1861.

VARYING WRITTEN AGREEMENT BY PAROL EVIDENCE.—FORMER ADJUDICATION.—LIEN OF JUDGMENT.—ENTRY OF ORDER.—MISTAKE IN AMOUNT DUE ON EXECUTION.

The court will not on motion allow parol evidence to enlarge the operation of a written agreement between the parties to an action, so as to discharge the lien of a judgment upon real estate belonging to the person against whom the judgment was recovered.

An omission to enter an order does not give the right to agitate the same question by a fresh motion. The unsuccessful party can enter the order when he desires to appeal, if the prevailing party omits to do so.

Where a plaintiff had two judgments against the same defendant, upon each of which execution had been issued, and the court, after hearing the parties, had decided that the sum realized under the execution was properly applicable to one of the judgments,—*Held*, that such order was conclusive upon the parties unless reversed on appeal.

Where an execution against property omitted to give the judgment-debtor credit for a payment which had been previously made upon the judgment, and real

Peet a. Cowenhoven.

property was sold under the execution, but for a sum less than the amount actually due upon the judgment,—*Held*, that the execution was not void by reason of the omission, and that the purchaser's rights under the sale were not to be disturbed.

Motion to set aside a sale of real estate on execution ; on two grounds : first, that the plaintiff had released it from the lien of the judgment ; second, that the execution stated the amount due on the judgment incorrectly.

The instrument claimed as a release stated, that in consideration of one dollar, the plaintiff agreed that the receivership obtained at his instance in this suit should not in any manner interfere with the premises conveyed, or to be conveyed, to the defendant by the sheriff of Kings county, in a foreclosure-suit wherein one Van Nest was plaintiff, provided such conveyance should be made. It was dated Nov. 10, 1858.

The property in question was bid in by the defendant in 1855, at a sale in foreclosure. Subsequently, the judgment in this suit was obtained, supplementary proceedings under it instituted, and a receiver appointed. The sale had not been closed, but the mortgagee, Van Nest, had agreed to allow the balance of the purchase-money to be secured by a mortgage. When he learned of the judgment in this suit, he refused to carry out this arrangement unless a release was obtained. On the part of the defendant it was testified that the paper already referred to was given and received as such a release, and in pursuance of an agreement to give such a release. The plaintiff denied this, but admitted its execution and delivery, and testified that it was executed to enable the defendant to give title to the lots. It was proved that the defendant there received the conveyance in the foreclosure-suit, and the property conveyed was sold under execution on the judgment in this suit. This motion was made to set that sale aside.

The amount stated in the execution to be due on the judgment was admitted to be \$100 too large. The property sold consisted of several lots, and was sold for \$400. The defendant claimed that less than this was due. This depended on the question whether a sum realized on a prior sale of other property should be applied on the judgment in this suit.

The plaintiff owned three judgments against the defendant.

Peet v. Cowenhoven.

One was satisfied, the senior one was paid in part, the junior one was in this suit. The prior sale was under two executions, one on the satisfied, the other on the junior judgment. The defendant, in 1860, made a motion before Mr. Justice Scrugham, in Kings county, to set aside this sale, and the plaintiff moved to amend by substituting the senior judgment for that which was satisfied in the execution; on the argument of that motion, the plaintiff took the ground that the sale was under the junior judgment, and therefore valid. The motion to amend was granted on terms. The plaintiff refused to enter the order or accept the terms, but after this motion was made entered the order, complied with its terms except as to paying costs, and notified the defendant that he gave him credit for these on the judgment. This order applied the proceeds of the prior sale on the senior judgment.

Everett P. Wheeler, for the motion.—I. The instrument in question, being intended and delivered as a release, in pursuance of an agreement made for a valuable consideration to give a release, and the defendant having performed his part of the agreement, is binding on the plaintiff as a release. (1 *Story Eq.*, § 649; *Atwood v. Vincent*, 17 *Conn.*, 575; *Whitehead v. Brown*, 18 *Ala.*, 682; *Craig v. Leslie*, 3 *Wheat.*, 563, 576.)

II. The instrument in question is sufficient on its face to protect the land. The order appointing the receiver vested him with the defendant's interest in his bid at the sale under foreclosure. (*Porter v. Williams*, 9 *N. Y.*, 142.) The judgment was no lien on this. (1 *Rev. Stat.*, 744, §§ 4–6; *Sage v. Cartwright*, 9 *N. Y.*, 49; *Griffin v. Spencer*, 6 *Hill*, 525.) And the change in the character of the defendant's interest from an equitable to a legal form did not divest the receiver's title. If the debtor manufactured wheat into bread, it would not divest the receiver's title.

III. If the amount due on a judgment is incorrectly stated in the judgment, it makes the sale and execution voidable on motion. (*Grah. Pr.*, 357; *Green v. Beals*, 2 *Cal.*, 254.) If the amount realized on the prior sale is applied on the judgment in this suit, the sale is clearly erroneous, for a parcel consisting of several lots was sold in a body for more than was due. The sale should have been in lots. (2 *Rev. Stat.*, 369, § 38; 617,

§ 37, 4 ed.) The plaintiff originally claimed that the prior sale was made under this judgment, and refused to accept the terms of an order allowing him to amend so as to apply it differently. Having thus induced the defendant to make this motion, he is estopped from denying that the sale was made under this judgment, or to claim the benefit of the order of SCRUGHAM, J. (*Walrath v. Redfield*, 18 *N. Y.*, 457, 461; *Dezell v. Odell*, 3 *Hill*, 215, 219, 221; 4 *Kent*, 261.)

Charles A. Nichols, opposed.—I. The petitioner substantially sets up a parol agreement to release property from a judgment, introducing, in evidence of this agreement, a writing which discloses a very different agreement:—an agreement that the receivership should not prevent a transfer of property to defendant is said to have been given in pursuance of an agreement to release his property from the judgment. Upon the face of the moving papers it appears that the existence of such a verbal agreement is improbable, and that if it existed it could not be enforced, and has no legal validity. The object desired by the defendant, which was equally desirable to plaintiff, did not require a release from the judgment. The agreement alleged is void, being without consideration. It is void, being an agreement relating to real estate and not in writing.

II. The written evidence of the agreement is free from ambiguity, explicit, and entirely consistent with the purpose for which it was requested, and reasonable. As such it cannot be contradicted or explained by any parol evidence.

III. The petitioner is not in a position to ask this thing of the court. The party swearing to the petition furnishes in his own affidavit contradiction of his sworn statement that the sale was a fraud on the rights of the petitioner, and that he bought on the faith of plaintiff's agreement to release. "A person has no right to apply to the court to set aside an execution for irregularity, so far as it affects his rights in a suit to which he is not a party." (*Pierce v. Alsop*, 3 *Barb. Ch.*, 184.) As to the alleged irregularity in not stating in the execution the exact amount due, there is no evidence of any misstatement. If there were, it would not affect the sale. (*Peck v. Tiffany*, 2 *N. Y.*, 451.)

IV. As to the other branch of the motion, it is founded upon an erroneous statement of facts. There was a valid judgment

Peet *a.* Cowenhoven.

and sale thereon in the case of The Rutgers Fire Ins. Co. *a.* Cowenhoven. The execution stated the wrong amount. It was amended by order of the court, and the proceeds of sale applied to the actual judgment. This order was absolute, and was not conditional, and disposes of the proceeds of the sale in that case. They cannot be again and otherwise applied. This order might be entered up by either party at any time.

LEONARD, J.—The written agreement of Nov. 10, 1858, cannot be enlarged or altered in its operation, by evidence of other prior oral agreements, in consummation of which the written agreement is alleged to be erroneously or defectively executed.

I do not mean to express any doubt that the written agreement is in exact conformity with the intention of the parties, and was the final result of their previous arrangements, as might be supposed, perhaps, from the strict technical rule above stated.

The bid referred to in the writing passed to the receiver when he was appointed; any interference with it by the defendant, by assignment or otherwise, or perhaps even by taking title, would have involved a contempt. The written agreement saved the defendant from such a result; and this object, with the right to sell and convey, without complaint on the part of the receiver, subject however to the lien of the judgment, was all the object designed to be attained by the parties, so far as it appears from the writing. Van Nest could have had no interest in the question, his mortgage being for consideration-money, unless indeed he knew of the receivership; and in that case the stipulation would be a protection to him, as he would be in danger of incurring the penalty of a contempt of court by dealing with the defendant in respect to the deposit made on the purchase of the property, or by making a conveyance to the defendant, when the receiver was entitled to it on fulfilling the terms of the defendant's bid. So that it is quite manifest that the stipulation, as signed by the plaintiff or his attorney, and accepted by the defendant or his agent, has a significance and value to the defendant and to Mr. Van Nest, and is limited in its effect precisely where the interest of the plaintiff would appear to require him, with due prudence, to intend the limit of its operation.

However the fact may be, it is wholly inadmissible, on principle, to alter the effect of a written agreement, to the extent

Peet a. Cowenhoven.

demanding here, on motion. Stipulations, affecting questions of mere practice, are sometimes vacated on motion; but no case can be found which is a precedent for so far enlarging the operation of a written agreement, on motion, as to discharge the lien of a judgment upon real estate belonging to the person against whom the judgment was recovered.

Another question embraced in the motion here, is disposed of by the order of this court in the second district, made on the 12th of March, 1860. The proceeds of the sale of the Front-street premises were there specifically applied to a different judgment from that in the action here entitled.

That application of the proceeds cannot be disturbed in another motion. Even if the decision there were wrong, it can be altered only on an appeal from that order. The omission to enter the order does not give the right again to agitate the question by a fresh motion. The defeated party can enter the order, where he desires to appeal, if the prevailing party omits to do so.

The sum of \$100 had been paid on the judgment in this action in 1858 or before, but the plaintiff, in issuing the execution whereon the premises in Brooklyn were recently sold, omitted to give credit for it, and directed the sheriff to collect the whole amount of the judgment.

The sheriff of Kings county made \$400 by a sale of real estate, and returned the execution unsatisfied as to the residue. A sum, exceeding the sum of \$100 in 1858, and the \$400 realized by the sheriff as aforesaid, was due on the judgment at the time of the sale.

No harm was done to the defendant by reason of the omission to deduct the payment of \$100 from the amount directed to be collected on the execution.

There is no irregularity to be corrected in order to save any rights to the defendant, of which he would otherwise be deprived.

The execution is not void by reason of the omission. The purchaser's rights are not to be disturbed. The omission can be now amended if necessary by entering an order to indorse the proper direction on the execution, "*nunc pro tunc*." But I do not think it necessary, as a sum still remains to be collected after deducting the payment and collection above mentioned.

The motion is denied, with \$10 costs of opposing, to be paid by the moving parties.

Crockett *a. Smith*.

CROCKETT *a. SMITH*.*Supreme Court, First District; At Chambers, July, 1860.*

DISCONTINUANCE ON PAYMENT OF COSTS.

A discontinuance is a final determination of the rights of the parties in an action, within the meaning of section 245 of the Code.

The defendant, after being arrested and held to bail, moved to vacate the order of arrest; but before the motion was heard or the complaint served, the plaintiff obtained an *ex-parte* order discontinuing the action on payment of costs, and tendered the costs which are allowed before notice of trial; and defendant claimed costs of the motion to vacate the order of arrest, and moved for leave to enter judgment of discontinuance. *Held*, that defendant might enter judgment of discontinuance, unless plaintiff consented to withdraw the order of discontinuance, and to bring the motion to vacate the order of arrest to a hearing; but that on this motion the court could not determine his right to claim the costs of that motion.

Motion for leave to enter judgment of discontinuance.

This was an action to recover \$500 for merchandise sold to the defendant. An order of arrest was issued on the ground of fraud in contracting the debt. The facts upon which the motion was based are sufficiently stated in the opinion.

Charles H. Smith, for the motion.

A. P. Whitehead, opposed.

LEONARD, J.—The defendant was arrested, and held to bail. The complaint has not been served. The defendant served affidavits and notice of motion to vacate the order of arrest.

While the motion was pending, but before it was heard, the plaintiffs obtained an *ex-parte* order discontinuing the action on payment of costs.

The plaintiffs' attorney tendered to the defendant's attorney the amount of costs provided by the Code to be paid before notice. The defendant claims the costs of the motion noticed by him to vacate the order of arrest, and moves for leave to enter judgment of discontinuance.

It is usual to allow the plaintiff in an action to discontinue, on payment of costs. That is the general practice. There are exceptions, however. It is refused where the defendant will sustain an irreparable injury, as in a case where he has interposed a counter-claim which would be barred by the Statute of Limitations, if the defendant were obliged to commence a new action. (*Rees v. Van Patten*, 13 *How. Pr.*, 258; *Van Allen v. Schermerhorn*, 14 *Ib.*, 287.) In this case the only injury would be the loss of the defendant's remedy on the undertaking given by the plaintiffs on obtaining the order of arrest.

The condition of the undertaking is, that if the defendant recover judgment, the plaintiffs will pay all costs awarded to and damages sustained by the defendant by reason of the arrest. If no judgment be recovered by the defendant, of course he can maintain no action on the undertaking.

The discontinuance admits the arrest to be wrongful, *prima facie*; at least that is the fair inference. The defendant may have sustained damages by reason of the arrest. It would be wrong to deprive him of the benefit of that which the law has provided for his protection.

The plaintiffs' counsel, however, urge that there is a defect in the Code, in failing to provide for any such judgment. He refers to the section defining a judgment. Section 245 states a judgment to be the final determination of the rights of the parties in the action. A discontinuance is, as I conceive, such a determination. The parties have no rights in the action to be determined after discontinuance, although, it is true, the rights of the parties have not been adjudicated. I do not think this section prevents the entry of such a judgment.

The question of the allowance of the costs of the motion to vacate the order of arrest, is not now properly before me. The court can only adjudicate that question upon an application after adjustment by the clerk.

I am willing to express it as my opinion that the clerk cannot allow them, unless costs are awarded in the order on the decision of the motion. The court cannot *direct* as to the costs of that motion in this.

It has been held, however, that a motion cannot be countermanded by the party who has given it, so as to deprive the opposite party of the right of attending and having the motion

Gasherie a. Apple.

dismissed with costs (*Bates a. Jaines*, 1 *Duer*, 668), in which decision all the judges concurred.

Under the order which I propose to make, the motion to vacate the order of arrest, unless heretofore disposed of, may perhaps still be brought on by the defendant, and the question of costs can be determined in the order then to be made.

The judge who granted the order of discontinuance could not have had the questions raised on this motion brought to his notice, inasmuch as that order was granted *ex parte*, on the plaintiffs' application.

The defendant has leave to enter judgment of discontinuance on the order heretofore granted, unless the plaintiffs prefer to consent to have that order vacated, and the motion to vacate the order of arrest brought to a hearing, with the same effect as if the order of discontinuance had not been entered.

GASHERIE *a.* APPLE.

New York Superior Court; At Chambers, August, 1861.

FRAUDULENT ASSIGNMENT.—ATTACHMENT AS PROVISIONAL REMEDY.—AFFIDAVITS TO SUSTAIN.*

The defendant may move to vacate an attachment, issued as a provisional remedy under the Code, as well after as before the assignment of his interest in the property attached.

On motion to vacate an attachment issued as a provisional remedy under the Code, founded on defendant's affidavit, the plaintiff will be allowed to make out his right to the attachment by supplementary affidavits.

* In *DAVIS a. HACKLEY* (*Supreme Court, First District; Special Term, April, 1862*), it was held by BARNARD, J., with the concurrence of the other justices, that, on a motion for an injunction, plaintiff might put in affidavits in contradiction or explanation of any new matter introduced by the defence; but that the defence might, during the proceedings, further answer the additional affidavits.

The action was brought to obtain an injunction restraining the comptroller of the city from paying, and the defendant Hackley, a contractor for cleaning the streets, from receiving, any moneys on account of cleaning the streets; and also for an appointment of a receiver, and an accounting on the part of the defendants holding the street-cleaning contract.

Gasherie v. Apple.

A debtor cannot use the power he has of assigning his property preferentially, to intimidate creditors into abstaining from pursuing the remedies allowed by law to collect debts, without being chargeable with intent to defraud them.

In equity, an insolvent debtor is trustee for his creditors, and he is bound to distribute his property among them, or allow them to collect their claims out of it. A change of the title to the property to a trustee may operate to obstruct the employment, by a creditor, of legal remedies against that property. The imposition upon that change of title of a trust, or condition, by which the share of each creditor in the assigned assets is made to depend on his leniency to the assignor, virtually retains power in the assignor's hands over the property for his own benefit, and therefore makes the assignment void.

Whatever purpose, which, if declared in writing and inserted in a general assignment of a debtor's property, renders it void as legally fraudulent, ought, when declared by the debtor, verbally, to be the object of an intended assignment, while holding possession of the property, to be considered as of an equally fraudulent character.

Where an attachment was issued as a provisional remedy under the Code, on the ground that the defendant was about to dispose of his property with intent to defraud creditors, such intent being manifested in a threat that if sued "he would make an assignment, and plaintiff could not get any thing, and he would do business under somebody else's name;" and defendant in his affidavit, read on the motion to vacate the attachment, set forth that he had sufficient property to pay all his debts in full if his creditors had given him a little time;—*Held*, that if the defendant was able to pay all his debts, his threat of making an assignment under which plaintiff would not get any thing, was evidence of an intention to defraud his creditors; and that the language attributed to him manifested a purpose to dispose of his property with intent to defraud creditors, and to conceal his property or earnings from plaintiff's pursuit.

Motion to dissolve an attachment issued as a provisional remedy.

The action was brought to recover the sum of \$2,268.65 for goods, suitable for use in the manufacture of shirts and draw-

P. G. Clark, John E. Burrill, S. B. Garvin, and H. H. Anderson, read the answers of the several defendants for whom they appeared, and some affidavits in opposition to the motion.

Edwin James, for the plaintiff, desired opportunity to produce affidavits in answer to the new matter which had been introduced.

Mr. Burrill and James T. Brady, opposed the request.

BARNARD, J., postponed the cause till the next day, saying, that he would consider the question in the mean time.

On the following day his honor stated, that in regard to the objection to the introduction of any further affidavits, he had conferred with the other justices of the district, and had concluded that it would be proper to permit the plaintiff to put in affidavits in contradiction to, or explanation of, any new matter introduced by the defence; but that the defence would have the right also, at any time during the proceedings, to further answer the additional affidavits.

Gasherie a. Apple.

ers, sold and delivered to the defendant. The attachment was granted upon the affidavit of the plaintiff, as to the existence and amount of the debt, and upon the affidavit of Moses Will, a salesman for the plaintiff, which contained the following allegations:

"This deponent says, as he verily believes, the said defendant is about to dispose of his property, with intent to defraud his creditors. Deponent further says, that he has, within the past three or four weeks, several times applied to the defendant to pay or secure said debt; and he, on the 19th instant, promised the plaintiffs that he would take an account of his stock, and show them a statement of his affairs, and give them security on his stock the next day. He did not call the next day; and deponent, on July 22, 1861, went to said defendant, and he told deponent he was not going to take an account of stock or give any security; deponent then told him the plaintiffs would sue him, and he replied that if they did, he would make an assignment, and they could not get any thing, and he would do business under somebody else's name."

The attachment was levied upon the defendant's property; the defendant thereafter made a general assignment of his property, with preferences, on the 26th day of July. On the 30th of July he noticed the present motion to vacate the attachment, upon affidavits denying the use of the expressions detailed in Will's affidavit, and stating that defendant had sufficient property to pay all his debts in full, if his creditors had given him a little time. On the motion, the plaintiff offered affidavits that the defendant used the expressions referred to on another occasion.

Solomon L. Hull, for the motion.

Charles H. Smith, opposed.—I. The defendant having made a general assignment, cannot move to discharge the attachment. His interest in the property is gone.

II. Even if the affidavit on which the attachment issued is deemed rebutted, the affidavits now read show conclusively that at the time the attachment issued the defendant was about to dispose of his property, with intent to defraud his creditors. He has now done so in the assignment made after levy of the attachment.

ROBERTSON, J.—The objection that the defendants cannot move to discharge the attachment in this case, founded on the cases of *Furman a. Walter* (13 *How. Pr.*, 348) and *Matter of Griswold* (13 *Barb.*, 412), is overruled by the provisions of section 241 of the Code, that the defendant may in all cases move to discharge an attachment, as in case of other provisional remedies. Whether the plaintiff can use supplemental affidavits, not only to disprove matters in the defendants' affidavits, on which the motion is made, but also to justify the issuing of the attachment, is a question which has been differently decided by different tribunals. A distinction undoubtedly exists between attachments, which are separate special proceedings and not in any action, where the affidavits on which they are issued must show jurisdictional facts, and those, which are mere provisional remedies. That distinction is ably discussed and laid down in *Furman a. Walter* (*supra*), upon the strength of which distinction the court held, in the case of *St. Amand a. De Beixcedon* (3 *Sandf.*, 703), that an attachment might be sustained by affidavits supplying defects in the original affidavits.

The Supreme Court of this district has, it is true, held, in the case of *Wilson a. Britton* (6 *Abbotts' Pr.*, 33), followed by that of *Dickinson a. Benham* (10 *Id.*, 390; 11 *Id.*, 158), that no supplemental affidavits were admissible on the part of the plaintiff, except such as contradicted the statements contained in the defendant's; but I consider the authority in *St. Amand a. De Beixcedon* as paramount in this court, even if it were not sustained by the reasoning in *Furman a. Walter*.

Although, therefore, it seems to be disproved, by the affidavits on behalf of the defendant, that he used the expressions contained in one of the affidavits on which the attachment was issued on the occasion therein mentioned, the new affidavit of the same witness, which is uncontradicted, shows that he used it on another occasion. This, therefore, renders necessary the examination of the question, whether such declaration is evidence of any fact which authorizes the issuing of an attachment.

The declaration in question resembles very much that discussed in *Wilson a. Britton* (26 *Barb.*, 562; 6 *Abbotts' Pr.*, 97), and that in *Dickinson a. Benham* (*supra*). In both these cases the declarations were held not to be evidence of a fraudulent intent, because the threat contained in them was only to do what

Gasherie *a.* Apple.

might be legal; but the effect of the condition accompanying it seems to have been overlooked in both cases, as affecting the question, to wit, in case of an action by the party threatened. Now it was conceded, in the case of *Griffin a. Marquardt* (21 *N. Y.*, 121), that a declaration by an assignor, that he had made an assignment for the purpose of gaining time to pay his creditors, was admissible, although held not to be conclusive; the question arises, whether a debtor can use the power he has of assigning his property preferentially, to intimidate creditors into abstaining from pursuing the remedies allowed by law to collect debts, without being chargeable with an intent to defraud them.

The common law held that a debtor was bound to apply his property to paying his debts, as they became due; and a creditor was entitled to pursue his legal remedies unobstructed, for the purpose of enforcing that obligation; every obstacle interposed by the debtor to bar or delay such pursuit, was void. (*Sands a. Hildreth*, 14 *Johns.*, 493.)

The Statute of Frauds and Statutes of Bankruptcy were passed to carry out this principle, the latter both expediting the creditor's pursuit, converting the failing debtor's estate into a trust-fund, and releasing the honest debtor on surrender of his estate. The law allows a debtor to assign his property to pay his debts, and even to make preferences, but compels him to make his selection without any conditions for personal gain to himself; thus he cannot, by an assignment, hold out a hope of an extra share of his assets, or a fear of loss of any participation therein, as a means to induce a creditor to abandon all, or any part of his claim, or to forbear pursuing his legal remedies therefor.

The cases in our courts, beginning with *Hyslop a. Clarke* (14 *Johns.*, 458) and *Searing a. Brinkerhoff* (5 *Johns. Ch.*, 329), continuing with *Austin a. Bell* (20 *Johns.*, 442), and ending with *Grover a. Wakeman* (11 *Wend.*, 187), sustain the doctrine as to coercion into abandoning part of a claim, as *Berry a. Riley* (2 *Barb.*, 307) does in reference to compulsory abstinence from suing.

I am aware that a threat by a debtor, to assign his property if sued, is not only frequently practised, but is considered an innocent mode of coercing creditors into extending the time of paying their claim; but I am at a loss to understand any legal

Gasherie *a. Apple*.

principle of distinction, as proof of a fraudulent intent, between an admission that the object of an assignment executed was to gain time, as in *Griffin v. Marquardt (supra)*, and a declaration that an assignment would be executed to defeat a remedy by action, in order to deter a creditor from bringing it.

In equity, an insolvent debtor is trustee for his creditors; and he is bound to distribute his property among them, or allow them to collect their claims out of it; a change of the title to the property to a trustee may operate to obstruct legal remedies against that property by any creditor, and therefore can only be employed for a legal purpose; the imposition upon that change of title of a trust or condition, by which the share of each creditor in the assigned assets is made to depend on his leniency to the assignor, virtually retains power in the assignor's hands over the property for his own benefit, and therefore makes the assignment altogether void. Whatever purpose, which, if declared in writing and inserted in the assignment renders it void as legally fraudulent, ought, when declared by the debtor verbally to be the object of an intended assignment while holding possession of the property, to be considered as of an equally fraudulent character. The mere change of title, or reduction of the intent to writing, as a condition, could not impart any new fraud to the intent.

A threat, therefore, by a debtor to a creditor, to make an assignment so as to deprive the latter of all share of his estate if he commenced an action, appears to me to be as much evidence of a fraudulent intent in fact, as the actual making of an assignment, with a like provision in it, is of a fraudulent intent in law.

Besides this, however, if the defendant's account of his assets is to be taken as correct, he could not legally assign his property so as to exclude the plaintiffs from any participation in it, as they exceed the amount of other claims against him; in fact, he states that he only wanted time to pay all his debts. In order, therefore, to prevent the plaintiffs from getting any thing, the intended assignment must have been fraudulent or an instrument of fraud; besides, the additional threat was made, of carrying on business in some one else's name, which can be only understood as intending to conceal the defendant's property or earnings from the plaintiffs' claim or pursuit.

Scott v. Williams.

The defendant may have honestly intended to have satisfied, when more convenient, the plaintiffs' claim, but he mistook his legal power over his own property, and his right to assign it to pay creditors, when he undertook to abuse that power of assigning it, by coercing a creditor into giving credit on a claim from fear of an assignment which should cut them off.

The motion to dissolve the attachment must therefore be denied, but without costs, as it is sustained only on the new affidavit.

SCOTT v. WILLIAMS.

Supreme Court, First District; At Chambers, December, 1861.

ARREST FOR FRAUD IN CONTRACTING OBLIGATION.—EVIDENCE OF
CONTEMPORANEOUS FRAUDS.—REFEREE TO TAKE EVIDENCE.

Where the defendant upon affidavit moves to vacate an order of arrest, which was granted on the ground of fraud in contracting the obligation upon which the action is brought, evidence of other contemporaneous frauds committed by the defendant is admissible, from its tendency to sustain the original charge of fraud, and to determine to which of the parties, in case of conflicting affidavits, credence should be given.

A referee appointed to take evidence should take all that is offered, and leave it to the court, on the hearing of the matter, to determine what is not competent.

Motion to discharge an order of arrest.

This action was brought to recover the price of a quantity of goods sold. An order of arrest was obtained on the ground of fraud in contracting the obligation, and also in attempting to dispose of property to defraud creditors. The defendants moved to vacate the order of arrest, upon affidavits contradicting the affidavits upon which the order of arrest was issued. The evidence as to fraud was conflicting, whereupon a referee was appointed to take the testimony and report to the court, with his opinion thereon. Before the referee certain evidence was offered by the plaintiffs, tending to show contemporaneous frauds. The referee excluded this evidence, and reported, as his opinion, that the order of arrest should be discharged. On the coming in of

Scott v. Williams.

his report, the plaintiff excepted to the referee's ruling as to the admissibility of evidence of contemporaneous frauds.

Peter Y. Cutler, for the plaintiffs.

William W. Peck, for the defendants.

LEONARD, J.—Where the order of arrest is founded on affidavits showing, in the first instance, that the defendant was guilty of fraud in contracting the obligation upon which the action is brought, proof of other contemporaneous frauds of a like character has a tendency to sustain the charge of fraud upon which such order of arrest was granted, and is admissible.

The proof of other contemporaneous frauds does not make out a new cause of arrest in the action, but enables the court better to decide, in the case of conflicting affidavits of the parties, to whom credence ought to be given.

It follows, then, that on a motion to discharge an order of arrest in such a case, on affidavits introduced on the part of the defendants in support of the motion, that the plaintiffs may sustain the order and resist the motion by proving other contemporaneous frauds by the defendants. It will not be a departure from the case originally made, on which the arrest was granted.

It is the business of a referee appointed to take evidence, to take all that is offered, and leave it to the court, on the hearing of the matter, to determine what is or is not competent.

The authority of the referee here was to take the evidence and report it, with his opinion; not to hear and decide any thing.

The plaintiffs must have leave to hand up any affidavits which they may think proper for the purpose of resisting the defendants' motion; such affidavits to be handed to the clerk at chambers on or before the second of January next, and the decision of the motion will be reserved till that time.

ROCK RIVER BANK *a.* HOFFMAN.

Supreme Court, First District; General Term, February, 1862.

PRIVILEGE OF CONSULS.—JURISDICTION.

Since the Constitution and laws of the United States prohibit the State courts from taking cognizance of suits affecting consuls, a State court has no jurisdiction to grant process against a consul, in an action in which he is named as a defendant.*

Process so granted being invalid, a revocation of the exequatur of the consul, after the commencement of the suit, is no answer to a motion to dismiss the action and vacate the process.

The fact that the consul is sued with others upon the joint liability of all, does not alter the case. The United States courts have jurisdiction in such case; and the State court cannot allow the consul's name to be struck out and the action to proceed against the other defendants.

Appeal from an order refusing to dismiss the complaint and vacate an attachment which had been granted in the cause.

* The case of our own consuls, ministers, &c., is different from that of like officers appointed by foreign governments. In *THE MECHANICS' BANK a. WEBB* (*Supreme Court, First District, Sp. T., July, 1861*), which was an action against James Watson Webb, who, before the action was commenced, had been appointed by the government of the United States minister to Brazil,—it was *held*, that an answer setting up that fact was frivolous.

The answer was in substance as follows :

"The defendant protesting against the jurisdiction of the court herein, and for no other purpose, answers the complaint as follows :

"That the court has no jurisdiction of the action. That at the time of the commencement of this action, the said defendant was, and ever since has been, and still is, envoy extraordinary and minister plenipotentiary of the United States of America to Brazil, duly appointed and commissioned as such by the President of the United States; and that by the Constitution of the United States, the courts of the United States alone have exclusive cognizance and jurisdiction in all cases affecting ambassadors, public ministers, and consuls."

Plaintiffs' counsel moved for judgment, on the ground that the answer was frivolous.

Chapman & Hitchcock, for the motion.

Evarts, Southmayd & Whitney, opposed.

LEONARD, J., granted the motion, with costs.

This action, and another one which was brought by George P. Naylor and others at the same time, were brought against Francis A. Hoffman, Otto Gelpcke, and Alexander Seller, who were partners in business in Chicago, Illinois. The causes of action were partnership debts. The plaintiffs obtained attachments to be issued on the ground of the non-residence of the defendants.

At special term, in December, 1861, the defendants moved to dismiss the complaint and vacate the attachment, on the ground that the defendant Hoffman was a consul for the Grand Duchy of Saxe Coburg Gotha, duly recognized as such by the United States.

On the motion it was proved on the part of defendants, that at the time the action was brought and the attachment was levied, Hoffman was such consul. In opposition, plaintiffs showed that since the motion was noticed, the government of the United States had, on the application of the plaintiffs, revoked the exequatur of Hoffman until he should furnish to the government satisfactory explanations of his attempt to defeat the ends of justice, by using his official position to avoid the proceedings against himself and partners.

The court denied the motion, with costs.

From the order entered thereon the defendants appealed.

B. Roelker and *Gilbert Dean*, for the appellants.

J. T. Doyle and *Charles W. Prentiss*, for the respondents.

BY THE COURT.—LEONARD, J.—When the attachment was granted, the defendant Hoffman was consul for the Duchy of Saxe Coburg Gotha, for the State of Illinois.

It issued against the property of all the defendants. The Constitution and laws of the United States prohibit the State courts from taking cognizance of suits affecting consuls.

It is thus apparent that this court were without jurisdiction to grant process of any kind against Hoffman when the attachment herein was issued.

The question of jurisdiction must be disposed of according to the facts existing when the action was commenced or the process issued. Being without jurisdiction, then, there was no basis upon which to incorporate it subsequently.

Rock River Bank *v.* Hoffman.

We think that the subsequent revocation of the exequatur of the consul did not give validity to process which was before invalid.

We think the case of *Valerino v. Thompson* (7 *N. Y.*, 576) is conclusive upon the questions here involved.

The Court of Appeals there held, that the courts of the United States have jurisdiction where a consul is sued with another person. The court, in that case, say: "The Constitution extends the jurisdiction of the United States courts to all cases 'affecting consuls,' and the Judiciary Act makes it exclusive of the State courts 'in all suits against consuls.'" That case further holds, that where a consul and another are necessarily co-defendants, it brings the co-defendant within the jurisdiction of the United States courts, by unavoidable implication (p. 582). We think this decision of the first court of our State must be considered conclusive here.

This action being against a consul, the State courts are ousted of jurisdiction.

There is no analogy between the contract of an infant, feme covert, bankrupt, &c., and the contract of a consul, when made jointly with others.

In an action against an infant or feme covert, on a joint contract with others, the name of such party may be stricken out, and the action proceed against the other joint contractors, because there never was any actual contract made by the infant or feme covert.

The contract of the consul is, however, a valid and binding obligation, whether made jointly with others or not. There is no principle upon which his name can be stricken from the action without disturbing the liability of the other joint contractors with him.

We are compelled to hold that this court have no jurisdiction over the action, and, of course, none to grant an attachment therein.

The order appealed from is reversed, and the attachment is vacated. No costs are allowed.

INGRAHAM, P. J., and CLERKE, J., concurred.

STEWART *a.* SMITH.*Court of Appeals ; July Term, 1859.*

APPEAL.—DOWER.—STATUTE OF LIMITATIONS.

An objection which was not raised at the trial, and which, if it had been, might possibly have been obviated, cannot be used as a ground of appeal.

It seems, that the defence of the Statute of Limitations must in all cases, even where the cause of action accrued before the enactment of the Code of Procedure, be raised by answer.

It seems, that a right of dower, accruing before the enactment of the Revised Statutes, is not affected by the limitation of the time for commencing the action prescribed by those statutes.

The Court of Appeals cannot look beyond the findings of facts contained in the case, in order to draw any inferences of fact bearing upon the appeal.

Appeal from a judgment, by which a judgment on the report of a referee was reversed and the complaint dismissed.

This was an action of ejectment for dower. William James Stewart, the husband of the plaintiff, died in 1823. During his lifetime, and after his intermarriage with the plaintiff, he was seized in fee of a tract of land including the premises in question. The premises in question are part of an old lane, known as Stewart's Lane, which ran through the lands of James A. Stewart, the father of the plaintiff's husband. This action was commenced in July, 1851, and was referred for trial on December 6th, 1853. On the trial the plaintiff proved the intermarriage between herself and William James Stewart, the seizin of Stewart after his marriage with the plaintiff, and his death in 1823. The referee made his report in favor of the plaintiff, and judgment was entered thereon, which was reversed at general term, and judgment entered in favor of the defendant, from which the plaintiff appealed to this court.

G. W. Stevens, for the appellant.—I. The husband of the plaintiff was seized and possessed in his lifetime of the premises in which the plaintiff now claims her dower. But seizin in fact

Stewart & Smith.

of the husband is not necessary to entitle the wife to dower; seizin in law is sufficient. (1 *Greenl. Cruise Dig.*, 49, 50, 157; *Atwood v. Atwood*, 22 *Pick.*, 283.)

II. Before the Revised Statutes took effect, a widow might bring an action for her dower at any time during her natural life. The statute now in force preserves this right where it had accrued at the time the statute took effect. (*Laws of 1806*, 616; 1 *Rev. Laws of 1813*, 60; 1 *Rev. Stat.*, 750, § 11.)

III. By the provisions of the Statute of Limitations, as contained in the Revised Statutes, rights of action which had already accrued, are excepted from the operation of that statute; the plaintiff is not affected by it. (2 *Rev. Stat.*, 300, § 45; *McCormick v. Barnum*, 10 *Wend.*, 104; *Van Hook v. Whitlock*, 3 *Paige*, 409; *Cole v. Irvine*, 6 *Hill*, 634.)

C. B. Hart, for the respondent.—I. The plaintiff should have demanded her dower within twenty years after the death of her husband, or, as he died in 1823, before the passage in 1830 of the Revised Statutes, she should have demanded it within twenty years next after their passage, which she has not done. (1 *Rev. Stat.*, 742, § 18.)

II. The plaintiff can only recover upon the strength of her husband's title. (*Poor v. Horton*, 15 *Barb.*, 485.)

III. To entitle a widow to dower, her husband must have been seized during the marriage not merely of the naked fee, but of a present estate or interest in possession. (*Dunham v. Osborn*, 1 *Paige*, 635; *Safford v. Safford*, 7 *Ib.*, 259.) Here the premises in question are a part of an ancient public street dedicated to the public use, and which had been open and in use by the public from previous to 1804 to within the last ten years, and until more than twenty years after the death of plaintiff's husband.

ALLEN, J.—The report of the referee in this case finds all the facts necessary in the first instance to entitle the plaintiff to recover, viz., marriage, seizin of the husband during coverture, and his death in 1823. No exception appears to have been taken on the hearing, to any decision, except as to the exclusion of certain evidence offered by the defendant, which will be found to have been wholly immaterial. It is now urged as the

most material point against the recovery that the plaintiff's demand of dower should have been made within 20 years after the death of her husband, or at all events within 20 years after the Revised Statutes took effect in 1830.

No such defence is set up in the answer, nor was it insisted upon on the hearing. It was not presented to the referee, nor passed upon by him, nor does he find that the action was not commenced within the period allowed by the statute. All this is conceded on the part of the defendant's counsel, but he argues that it was not necessary to raise the objection or set up the defence in the answer, and such seems to have been the opinion of the court below. The Code of 1852, § 74, declares that civil actions can only be commenced within the period prescribed in the 2d title, after the cause of action shall have accrued; except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section 73. Section 73 enacts that the title shall not extend to actions already commenced, or to causes where the right of action has already accrued, but that the statute now (then) in force shall be applicable to such cases.

The court below say that the Code has no application because the right of action, if any, accrued long before the date of the special statute in which the limitation specially applicable is prescribed, viz., the statute of dower. It is believed, however, that the court did not give full force to the closing clause of section 74. The exceptions are all before it, and it concludes with an independent sentence in these words: "But the objection that the action was not commenced within the time limited, can only be taken by answer."

It has been held at special term (10 *How. Pr.*, 383), that this last sentence applies to all actions commenced since the Code took effect, although the cause of action accrued previously, and such would seem to be the natural and fair construction to be gathered from a due consideration of all its provisions. But whether this be so or not, it appears to me that the neglect to present it on the trial is fatal to its being urged in the Court of Appeals. The case and the findings and report of the referee are all wholly silent on the subject; and we find the objection for the first time raised in the third exception to the referee's finding and report, which is that he did not find that plaintiff

Stewart a. Smith.

had not demanded her dower within 20 years after the death of her husband, or within 20 years next after the passage of the Revised Statutes. The defendant did not ask the referee to find, nor does it appear anywhere in the case that he resisted a recovery upon that ground.

In the first place it may be doubted whether the 18th section of the act (2 *Rev. Stat.*, 742), which requires a widow to demand her dower within 20 years, is applicable to a case where the right of action had accrued previous to its passage. By 2 *Rev. Stat.*, 300, § 45, it is enacted that any provision limiting the time for bringing actions shall not affect a vested right, that is, where the right to bring an action had already accrued. There have been adjudications on this question in our several courts, which I know do not harmonize. In *Sayre a. Wisner* (8 *Wend.*, 661), Ch. J. Savage in delivering the opinion of the court remarked, that the Statute of Limitations was not retroactive, but that it was strictly within the rule to say it might be applicable to cases of previous death, but not till 20 years after the statute took effect; but this he does not say is a proper legal construction of the section. In *Ward a. Huets*, he seemed to think that the excepting clause just cited (2 *Rev. Stat.*, 700) applied to all cases, although he cited with approbation *Sayre a. Wisner*. In *Van Hook a. Whitlock* (3 *Paige*, 409, 416), the chancellor came to the conclusion that the 41st section had restricted the application of the Revised Statutes as to limitations, to actions where the right accrued after their passage. Here the right had accrued before their passage; and before the Revised Statutes a widow might bring an action for her dower at any time during her natural life. (1 *Rev. Laws of 1813*, 60; *Laws of 1806*, 616.) And 1 *Rev. Stat.*, 700, § 11, declares that none of the provisions in the chapter, except those converting formal trusts into legal estates, shall be construed as defeating or impairing any vested estate, interest, or right.

I know it is argued, and not without force, as cases are cited which go to support the proposition, that there is a distinction between acts which affect the right, and those which affect the remedy only. That the plaintiff's action was for dower, and not for liberty to demand it during her life. That the Revised Statutes only shortened the time of the remedy, and not the right of action itself; and that a State may regulate at pleasure

the mode of proceedings in its courts in relation to past contracts as well as future, and may shorten the period of time in which claims shall be barred by the Statute of Limitations. (4 *Cow.*, 384; 6 *Wend.*, 526. *Morse v. Goold* (11 *N. Y.*, 281), where *DENIO*, J., remarked that the limitation was no part of the right or contract (*Ib.*, 308); and *Conkey v. Hart* (14 *Ib.*, 22), where it is said by *JOHNSON*, Ch. J., that "all the cases recognize the obvious distinction between impairing the obligation of the contract, and altering the remedy for a breach of it.")

Secondly, conceding that the plaintiff should have brought her action within 20 years after the Revised Statutes took effect, how does it appear here that the action was not brought within that period, or that she was subject to none of the exceptions contained in the section now contested, but that if the objection had been taken she might have been prepared by proofs to have obviated it? It is said that the complaint was sworn to, and showed that the action was commenced after the expiration of the 20 years, and that inasmuch therefore as the objection could not have been answered if made, it may now be taken here. The date of the summons, it is true, was the 16th of July, 1851, but an action may have been commenced previous to that, and the plaintiff may have been insane during a portion of the period. It is enough to say that the objection might have been obviated if it had been taken on the trial, and that it is not found to have been there taken in the report.

As to the other objections to the recovery, the same remarks are to a great extent applicable. The referee, as already observed, finds all the facts necessary to establish the plaintiff's right of recovery. He finds that her husband was seized in fee simple of the premises subsequent to his marriage with plaintiff, and prior to his decease. He was seized in law under his conveyance from John James Stewart; this is sufficient. He had the right of possession as far as the finding shows, and we cannot go beyond that in our examination of the case. No objection was made that the husband had not the immediate right of possession as far as the finding shows, and we cannot go beyond that in our examination of the case. No objection was made that the husband had not the immediate right of possession of the street, or that the premises were part of a public street dedicated to the public use, or that the right of user of

Newbould *a.* Warrin.

the street had not terminated 10 years ago; as are now urged in the points; nor is there any finding to warrant or authorize such objections. If the finding was or is defective as to these points, the defendant should have had it corrected and made more full. The exception as to the refusal to receive the deeds in evidence was altogether immaterial. The deeds only went to prove that plaintiff's husband had parted with his interest in the premises, but not that she joined in the conveyance and parted with her right of dower.

Neither is there any force in the objection that the plaintiff had disposed of her dower. There was no evidence of this fact, except as to her parol declarations, and they did not go far enough if valid; but they were entirely invalid. Nothing but a release in writing could have been binding upon her, and no such release was presumed or pretended.

The plaintiff was clearly entitled to recover, and the judgment of the Supreme Court must be reversed, and the judgment rendered for the plaintiff, and the report of the referee affirmed.

NEWBOULD *a.* WARRIN.

Supreme Court, First District; Special Term, March, 1862.

JOINDER AND DEFECT OF PARTIES.—DEMURRER.

No one can demur for defect of parties to an action, unless his own interest requires that the defect should be cured.

It is settled that when a debtor fraudulently disposes of his property to several persons, his judgment-creditors may sue all such persons in one action, for the purpose of having such property applied to the satisfaction of their claims.

Demurrer to the complaint.

This was an action by John A. Newbould against Thomas Warrin, Samuel Lord, William J. Lewis, and others.

The complaint was in the nature of a creditor's bill to reach the property of the defendant Thomas Warrin, a part of which,

of the alleged value of \$6,000, was alleged to have been collusively and fraudulently mortgaged to the defendant Samuel Lord (the father-in-law of Warrin), to defraud Warrin's creditors; and another part of which, valued at \$80,000 (alleged to have been assigned to one Charles W. Dayton, now deceased, by defendant Warrin, and one Blake, for the benefit of their creditors), was alleged to be wrongfully claimed by the defendant William J. Lewis, who was formerly an assistant of Warrin and Blake. The defendants Samuel Lord and William J. Lewis demurred to the complaint, and assigned for causes of demurrer: *First*, that there was a defect of parties defendant in this—that the personal representatives of Charles W. Dayton, deceased, should have been made parties defendant. *Second*, that several causes of action had been improperly united in this—that the complaint contains causes of action growing out of separate and distinct transactions,—causes of action to recover real property, causes of action to recover personal property, and causes of action against a trustee,—and that said causes of action do not affect all the parties to this action, and are not separately stated. *Third*, that the complaint did not state facts sufficient to constitute a cause of action against either of defendants Lord and Lewis.

William R. Stafford, for the defendants.

Samuel Owen, for the plaintiff.—I. The personal representatives of Charles W. Dayton are not necessary parties to this action. 1. The assignment to Dayton is not impeached. Nor is any relief asked by reason of Dayton's acts which can affect his personal representatives, or even Dayton himself were he living. The sales by Dayton to himself were absolutely void. The profits and all the acts of Dayton for his own benefit inured to the benefit of the trust, and therefore could not descend to his personal representatives. (1 *Rev. Stat.*, 730; 1 *Pars. on Con.*, 75; *East v. Henchman*, 1 *Ves. Jr.*, 289; *Massey v. Davis*, 2 *Ib.*, 317; *Lawsher v. Lawsher*, 3 *Ib.*, 502; *Coles v. Freceathick*, 9 *Ves.*, 234; *Wren v. Kizner*, 13 *Ib.*, 103; *Gardner v. McCutcheon*, 4 *Beav.*, 534; *Den v. Hamill*, 3 *Harr.*, 74; *Devoue v. Fanning*, 2 *Johns. Ch.*, 252.) The allegations of fraudulent sales and acts of Dayton are stated in connection with the allegation that defendant Warrin, after

Newbould *a.* Warrin.

Dayton's death, possessed himself of the assets undisposed of, and the defendant Lewis carried on the business ever since, and pretends he owns the stock and store. These allegations are part of the *res gestæ* of the fraud of the principal defendant Warrin, and for the purpose of making him and Lewis account as to the disposition of the assets of Warrin and Blake taken into their possession. Even if Dayton were living, he would not be a necessary party, except to reach the assets in his possession or under his control, or make him account for them. If his personal representatives had possession, they might be necessary parties; but the defendants Warrin and Lewis having wrongfully possessed themselves of them, and the representatives having no right, the latter cannot be necessary parties. 2. Upon the death of Dayton the trust vested in the Supreme Court, and did not descend to his personal representatives. The Supreme Court at the commencement of this action was and now is vested with all the rights, powers, and duties of the trustee. The defendants Warrin and Lewis are charged with the wrongful possession of the assets, thereby usurping the rights of the court. Inasmuch as no relief is sought against the assignment itself, and Dayton's sale to himself is void, the court has the power to make them show what assets they have in their possession, and what disposition they have made of them since they wrongfully possessed themselves of them; and on their accounting the court may give the plaintiff any relief he is entitled to. (1 *Rev. Stat.*, 730; *Code*, §§ 69, 122, 275; *Reed a. Bank of Newburgh*, 1 *Paige*, 215; *Matter of Stevenson*, 3 *Ib.*, 420; *King a. Donnelly*, 5 *Ib.*, 46; *Matter of Van Schoonhoven*, 5 *Ib.*, 559; *Hawley a. Ross*, 7 *Ib.*, 103; *McCosker a. Brady*, 1 *Barb. Ch.*, 329; 1 *N. Y.*, 214; *Emery a. Pease*, 20 *Ib.*, 62.) Even if the plaintiff asks for more relief than he is entitled to, it is no ground of demurrer if he is entitled to any relief. (*Code*, §§ 69, 122, 275; *Andrews a. Shaffer*, 12 *How. Pr.*, 441; *Lord a. Vreeland*, 13 *Abbotts' Pr.*, 195; *Emery a. Pease*, 20 *N. Y.*, 62.) 3. It is only when the court cannot determine the rights of the parties before it without prejudice to the rights of others not before it, that it is necessary the latter should be parties. (*Code*, § 122; *Wallace a. Eton*, 5 *How. Pr.*, 99; *McMahon a. Harrison*, 12 *Ib.*, 39.) The meaning of section 122 of the Code is, that if there are any persons not parties, whose rights must be settled

before the rights of the respective parties before the court can be determined, they must be brought in. A new defendant will never be added against the wishes of the plaintiff, where he is not absolutely a necessary party. (Shaver *a.* Brainard, 29 *Barb.*, 25; McMahon *a.* Harrison, 12 *How. Pr.*, 39; Sawyer *a.* Chambers, 11 *Abbotts' Pr.*, 110.) The rights of the personal representatives of Dayton, if any they have, may be saved by the court if necessary, and especially as the court has entire control of the trust, and the court may still give the plaintiff relief on his bill. (1 *Rev. Stat.*, 730; *Code*, §§ 122, 275; Emery *a.* Pease, 20 *N. Y.*, 62.)

II. The objection as to the non-joinder of the personal representatives of Dayton, even if a valid one, is not available on the part of either of the defendants Lord or Lewis. 1. It does not appear on the face of the complaint that they either have any possible interest in bringing the representatives in. If they have, they should have set it up by answer. (*Code*, §§ 122, 147; Hillman *a.* Hillman, 14 *How. Pr.*, 456; Crook *a.* O'Higgins, *Id.*, 154.) If the representatives of Dayton themselves applied to come in, it would have to be for reasons not stated in the complaint. The application should be made by them to have the complaint amended if they think it necessary. (*Code*, § 122.) 2. The defendants Lord and Lewis are neither of them creditors of Warrin, and therefore have not right even to have a substituted trustee. (1 *Rev. Stat.*, 730; King *a.* Donnelly, 5 *Paige*, 46; Brady *a.* McCosker, 1 *N. Y.*, 214; 3 *Barb. Ch.*, 329.)

III. The cause of action stated in the complaint is single. It arises out of transactions connected with the same subject of action. (*Code*, § 167; Hammond *a.* Hudson River Iron, &c., Co., 20 *Barb.*, 378; Cahoon *a.* Bank of Utica, 7 *N. Y.*, 486; Boyd *a.* Hoyt, 5 *Paige*, 65; Bank of British N. A. *a.* Suydam, 6 *How. Pr.*, 379; Young *a.* Edwards, 11 *Id.*, 201; Brewer *a.* Temple, 15 *Id.*, 286; Robinson *a.* Flint, 16 *Id.*, 240; *Ct. of Appeals*, Reed *a.* Stryker, 12 *Abbotts' Pr.*, 47; Morton *a.* Weil, 11 *Id.*, 421.) 1. To require distinct actions for distinct portions of defendant Warrin's property, would tend to unnecessary and useless litigation, which is contrary to the policy of the law. (3 *Johns.*, 566; Trustees *a.* Nicoll, 10 *Barb.*, 656; Boyd *a.* Hoyt, 5 *Paige*, 65.) 2. It is only where the causes of action

Newbould *a.* Warrin.

are so utterly inconsistent or incongruous as to require different proof, different judgments, and different final process, that this objection is valid. (*Alger a. Scoville*, 6 *How. Pr.*, 131; *Bank of British N. A. a. Suydam*, *Id.*, 379; *Smith a. Hallock*, 8 *Id.*, 73; *Colwell a. N. Y. & Erie R. R. Co.*, 9 *Id.*, 311; *Sweet a. Ingerson*, 12 *Id.*, 331; *Lattin a. McCarty*, 17 *Id.*, 239.) 3. The subject of the action is the property of the debtor. The cause of action is the fraudulent disposition and impediments thrown in the way of the collection of the plaintiff's judgments; and the relief sought is the removal of those impediments or part of them. (*Code*, §§ 122, 257; *Emery a. Pease*, 20 *N. Y.*, 62; *Hammond a. Hudson Iron, &c., Co.*, 20 *Barb.*, 378; *Morton a. Weil*, 11 *Abbotts' Pr.*, 421; *Young a. Edwards*, 11 *How. Pr.*, 201.) 4. The plaintiff by virtue of his judgment has a lien on all the real and personal property of the debtor, and alleges the defendants are fraudulently endeavoring to defeat it. (*Bank of British N. A. a. Suydam*, 6 *Id.*, 379.) This lien remains undivided. The debtor cannot fraudulently divide the subject of it so as to impose upon the creditor the grievance of many suits, although he may subject him to the burden of many parties. (*Bank of British N. A. a. Suydam*, *supra*; *Brady a. McCosker*, 1 *N. Y.*, 214.) If the proceeding was by execution, it would go at once against every one having the debtor's property. This proceeding is but another mode of extending an execution upon property not directly liable. (*Boyd a. Hoyt*, 5 *Paige*, 65.) 5. The various charges against the different parties tend to one point to prove the fraud and endeavors of the principal defendant Warrin, and his collusive transferees to prevent the collection by the ordinary process of law of the plaintiff's judgment, and each charge constitutes part of the *res gestæ*. (*Hillman a. Hillman*, 14 *How. Pr.*, 456; *Brewer a. Temple*, 15 *Id.*, 286; *Ct. of Appeals*, *Reed a. Stryker*, 12 *Abbotts' Pr.*, 47.) 6. It is not necessary that the defendants should be jointly interested or jointly conspire to deprive the plaintiff of his rights. If the fraudulent intent exists on the part of the debtor, they are all affected by the same taint. (*Morton a. Weil*, 11 *Id.*, 421.)

IV. The cause of action stated in the complaint affects all the parties to the action. 1. The defendant has the right to bring all the parties concerned in the transactions connected with the subject of the action before the court, so that the whole

object of the bill may be obtained in one suit. (MOSELY, V. C., *Boyd a. Hoyt*, 5 *Paige*, 65.) To require distinct actions against distinct parties would tend to useless litigation. (*Boyd a. Hoyt*, 5 *Paige*, 65; *Trustees a. Nicoll*, 10 *Barb.*, 656.) 2. They are charged with fraudulent, dishonest, and unlawful conduct, and with efforts to hinder and delay the plaintiff in the collection of his debt. They are not brought into court to force them into litigation, but to give them an opportunity to be heard if they desire it. (*Hammond a. Hudson Iron, &c., Co.*, 20 *Ib.*, 378.)

V. The objection that causes of action are not separately stated is not available on demurrer. The requirement in section 167 of the Code is matter of form, and to give symmetry to pleadings. (*Cook a. Chase*, 3 *Duer*, 643; *Harsen a. Bayard*, 5 *Ib.*, 656; *Woodbury a. Sachrider*, 2 *Abbotts' Pr.*, 402; *Badger a. Benedict*, 4 *Ib.*, 176; *Dorman a. Kellum*, *Ib.*, 202; *Lord a. Vreeland*, 13 *Ib.*, 195; *Peckham a. Smith*, 9 *How. Pr.*, 436; *Gooding a. McAllister*, *Ib.*, 123; *Robinson a. Judd*, *Ib.*, 378; *Forsyth a. Edminston*, 11 *Ib.*, 408; *Lattin a. Mc Carty*, 17 *Ib.*, 239; *Cheney a. Fisk*, 22 *Ib.*, 236; *Prindle a. Caruthers*, 15 *N. Y.*, 425.) The terms improperly united in section 167 of the Code relate to the character of the causes of action and not the mode of stating them. The remedy is by motion. (Same cases; *Gooding a. McAllister*, 9 *How. Pr.*, 123; *Robinson a. Judd*, *Ib.*, 378; *Dorman a. Kellum*, 4 *Abbotts' Pr.*, 202; *Harsen a. Bayard*, 5 *Duer*, 656.) The court at any stage of the action may disregard these matters of form. (*Code*, § 176; *Prindle a. Caruthers*, 15 *N. Y.*, 425.)

VI. If the defendant is entitled to any relief whatever against Lewis and Lord, this objection by demurrer cannot be sustained. (*Code*, §§ 122, 275; *Emery a. Pease*, 20 *N. Y.*, 62; *Hillman a. Hillman*, 14 *How. Pr.*, 456; *Stuyvesant a. Mayor, &c., of N. Y.*, 11 *Paige*, 414; *Brady a. McCosker*, 1 *N. Y.*, 214.)

MASON, J.—This case comes before the court on separate demurrers taken to the complaint by Samuel Lord and William J. Lewis. Neither of these defendants Lord or Lewis can raise the question by demurrer that the legal representatives of Charles W. Dayton should have been made defendants in this action, as neither of them has any interest in that branch of the case. It is only when the defendant has an interest himself in

another's being made defendant, that he can demur for want of parties. It must appear that his interest requires that such other party should be made defendant, before he can demur. (14 *How. Pr.*, 546, 460.)

There is, in my judgment, a good cause of action stated in the complaint both against Lord and Lewis. If the allegations of the complaint are true, the plaintiff is entitled to have the chattel mortgage given to Lord declared fraudulent and set aside; and as to Lewis, the allegation substantially is that Lewis has property in his possession, and which he fraudulently covers up and claims to be owner of, but which, in fact, belongs to the said Thomas Warrin, and should be devoted to the payment of the plaintiff's judgments.

There is no misjoinder of causes of action as I understand the rule to be settled by the Court of Appeals. (Reed *a.* Stryker, 12 *Abbotts' Pr.*, 47; Emery *a.* Pease, 20 *N. Y.*, 62. See, also, 20 *Barb.*, 387; 11 *Abbotts' Pr.*, 427; 11 *How. Pr.*, 201.) There must be judgment for the plaintiff on the demurrer, with leave to the defendants to answer, on the payment of the costs of the demurrer.

COE *a.* COE.

Supreme Court, Sixth District; General Term, October, 1861.
Again, General Term, May, 1862.

REFERENCE OF CLAIM AGAINST ESTATE OF DECEDENT.—JUDGMENT ON THE REPORT.—APPEAL.

Under 2 Rev. Stat., 89, 90,—which authorizes a reference of claims against the estates of deceased persons, by agreement between the claimant and the personal representative,—the court have no power to order judgment *against* the report of the referee. Either the report must be confirmed, and judgment ordered thereon; or it must be set aside, in which case a new trial follows before the same referees or others appointed in their places.

It seems, that these proceedings cannot be deemed a civil action under the Code, but must be governed, to some extent, by the analogy of the former practice.

Where the unsuccessful party has taken no exceptions to the report of the referee to whom a claim against the estate of a decedent was referred under the stat-

Coe *a. Coe*.

ute, and has made no case, the court, on a motion for judgment on the report, cannot do otherwise than to confirm the report, with leave to enter judgment; but it may, in its discretion, give the unsuccessful party leave to except to the report, and to make a case and exceptions which should form part of the judgment-roll, so that he could review the decision of the referee by an appeal.

Leave to file such exceptions *nunc pro tunc*, and time to make a case and exceptions, was given by the court at general term, on appeal from an order confirming the report.

Proceedings on the report of a referee, to whom a claim against the estate of a deceased person was referred.

I.—*October, 1860.* Appeal from a judgment on the report of the referee.

Ruth C. Coe, the plaintiff, presented a claim, upon a promissory note, against William C. Coe, deceased, to his administrators, Abigail Coe and Joseph Mason, the defendants, who doubted the justice of it, but entered into an agreement with the plaintiff, Ruth C. Coe, to refer the same to a referee. The claim was thereupon referred to a referee, who was approved by the surrogate of the county of Madison. The referee heard the proofs of the parties, and made his report, whereby he found there was due from the estate of William C. Coe, deceased, to the plaintiff, the sum of \$222.50. The plaintiff then made a motion, at the Madison special term, in February, 1861, for an order confirming the report, and for judgment, which was opposed.

The justice, who held the special term, was of the opinion that the report, on its face, showed that the claim was barred by the Statute of Limitations; and he denied the motion, and gave the defendants leave to enter judgment against the plaintiff with costs. Judgment was then entered against the plaintiff for costs.

The plaintiff appealed from the judgment to the general term.

Pratt & Mitchell, for the appellant.

James Noxon, for the respondents.

BY THE COURT.—ALLEN, J.—No case was made by the defendants for the purpose of reviewing the trial before the ref-

eree, and no exceptions were taken to his report. Neither the statute authorizing the reference, nor the Code, in terms prescribes the practice upon a review of the trial before the referee; and the proceedings must be made to conform as near as may be to the established practice in other cases. The statute regulating the trial declares that the same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control as if the reference had been made in an action in which the court might direct a reference. (2 *Rev. Stat.*, 89, § 37.) The proceeding is substantially a suit, being a legal proceeding in a court to ascertain the amount due, to enforce its collection. (Robert *a.* Ditmas, 7 *Wend.*, 522.) It is not commenced by the service of a summons, and is not an ordinary proceeding for the enforcement of a right, and is not, therefore, technically an action within the provision and definition of the Code, §§ 2, 127. It is, nevertheless, a judicial proceeding, terminating in a judgment. (People *a.* County Judge of Rensselaer County, 13 *How. Pr.*, 398.)

Since the enactment authorizing and regulating the reference of claims against the estate of deceased persons, the judicial system has been changed and a new code of practice adopted, much more complicated and intricate in its machinery and workings than the former, and it is not easy, in all cases, to adapt the new system and forms of procedure to the remedies secured by special statutes.

Under the former practice, less technical than the present, the process for a review of the trial and the correction of the errors of the referee in cases like the present, was quite simple. The statute provides that the court may set aside the report of the referees or appoint others in their place, and may confirm such report and adjudge costs, as in actions against executors. (2 *Rev. Stat.*, *supra.*) The order to confirm the report, and for judgment, was an order of course and *nisi*, and only became absolute after the *quarto die post*; and judgment was entered upon it in the same manner and with the like effect as upon the verdict of a jury. (Burhans *a.* Burhans, 10 *Wend.*, 601; Woodin *a.* Bagley, 13 *Ib.*, 453.*) Within the four days the de-

* And see Boyd *a.* Bigelow, 14 *How. Pr.*, 511.

feated party might move for a new trial, as upon a trial at circuit, and if the argument could not be had within the four days, proceedings upon the report might be stayed, as in other cases. The report was confirmed, unless the unsuccessful party, upon a case, and in the usual way, asked for and obtained a new trial.

Under the Code, common orders are abolished, and if an order of confirmation and for judgment upon the report is necessary, it must be made at special term upon a special application. (*Code*, §§ 278, 401.)

The Code gives an appeal from the judgment as the only method of reviewing a trial, except in the very few cases specially provided for, in which a motion for a new trial may be made. As this proceeding is not a civil action within the Code, it is not within the provisions of that act, and the form of procedure must be regulated by analogy to its provisions rather than by the terms of the act.* The appeals given by the Code are confined to judgments and orders in civil actions. (*Code*, § 323.) And an appeal from a judgment on the report of a referee in a case like this, would not lie except upon a very liberal interpretation of the statute. There only two ways that occur to me in which the report of the referee can be reviewed upon a reference to settle claims made against executors and administrators. One is by an appeal to the general term directly from the judgment on the report of the referee, and upon a case or cases, or case and exceptions, making a part of the record (*Code*, §§ 268, 272, 348; *Dana v. Howe*, 13 *N. Y.*, 306; *Johnson v. Whitlock*, *Ib.*, 344); and the other is by a motion for a new trial at the special term, by way of opposing the motion to confirm the report. In the latter case the party would have the same opportunity to move that was given under the former practice after the rule for interlocutory judgment

* The question whether this proceeding is an action or not has been mooted, in reference to the right to costs. In *Lansing v. Cole* (*Code R.*, 246), and *Munson v. Howell* (12 *Abbotts' Pr.*, 77), it was held that it is an action within 2 Rev. Stat., 89, § 41. The contrary was held in *Van Stickler v. Graham* (7 *How. Pr.*, 208), and *Avery v. Smith* (9 *Ib.*, 349), but the result of these latter cases was disapproved in *Linn v. Clow* (14 *Ib.*, 508).

As to the tests by which it is to be distinguished from an arbitration, see *Akely v. Akely*, 17 *How. Pr.*, 21.

Consult, also, *Tracy v. Suydam*, 30 *Barb.*, 110.

was entered; and upon cause shown, time for preparing the case and exceptions would be given, and the motion to confirm the report and for judgment suspended until the hearing of the motion for a new trial. In this, as in the other mode of procedure suggested, a case or exceptions must be prepared by the party aggrieved by the report. This appears to me the most natural and simple way of bringing the case before the court.

But it is not necessary for us to settle the practice. It is enough that the judgment given at special term was unauthorized by law. A judgment under the statute, when given, must be upon the report of the referee confirmed by the court, not by the court notwithstanding or against the report of the referee. (2 *Rev. Stat.*, *supra*.) The court may only set aside the report of the referees or appoint other referees in their stead, if the report is erroneous or unsatisfactory, or it may confirm the report, and in that case adjudge costs as in actions against executors. If the report is set aside, a new trial before the same or other referees follows of course. The report being set aside, there is nothing upon which to base a judgment for costs. It is a statutory proceeding, and the only authority for a judgment is the report of the referee, which is subject to examination by the court; but the court cannot, upon setting aside the report, virtually displace the referee by itself pronouncing the judgment which the referee should have given. The judgment is not simply irregular, but erroneous, and must be reversed with costs; and as the practice is unsettled, the proceedings are remitted to the special term, to the end that either party may apply for such relief as they may be advised they are entitled to.

II.—*May*, 1862. Appeal from order confirming the report of the referee.

The plaintiff afterwards made a motion at the Oneida special term, in November, 1861, for an order confirming the report of the referee, and for judgment, which motion was granted. But leave was given to the defendants to make a case or exceptions.

The People *a.* Powell.

The defendants appealed from the order confirming the report of the referee, and giving the plaintiff leave to enter judgment on the report, to the general term of the court.

Joseph Mason, for the appellants.

J. Sterling Smith, for the respondent.

HELD, *by the Court*,* that the justice, at special term, could not do otherwise than confirm the report of the referee and give the plaintiff leave to enter judgment thereon. Also, that the defendants could appeal from the judgment to the general term; and that it was proper, or at least matter of discretion, for the justice at special term to grant leave to the defendants to except to the report of the referee, and make a case and exceptions that should form part of the judgment-roll, so that they could review the decisions of the referee by an appeal from the judgment.

The court affirmed the special-term order, with \$10 costs, and gave the defendants leave to file exceptions to the report of the referee, *nunc pro tunc*, and time to make a case and exceptions.

THE PEOPLE *a.* POWELL.

Court of General Sessions of New York, April, 1862.

COURTS OF SESSIONS.—POWER TO GRANT NEW TRIAL.

The Court of General Sessions of the city and county of New York have power to grant new trials upon the merits, and on the ground of newly-discovered evidence. The act of 1859 (*Laws of 1859*, ch. 339, § 4)—which grants to the Courts of Sessions of the several counties of the State the power to grant new trials—extends to the Court of General Sessions in the city and county of New York. The history of Courts of Sessions, considered.

Motion for a new trial.

* Present, BALCOM, CAMPBELL, PARKER, and MASON, JJ.

affirmed
5 add. ns. 113
39 n.Y. 39

The People *v.* Powell.

The facts are stated in the opinion of the court.

Charles S. Spencer, for the motion.

A. Oakey Hall, district-attorney, opposed.

HOFFMAN, RECORDER.—The prisoner, Joseph Powell, having been convicted of grand larceny at the February (1862) term of this court, his counsel has moved the court to grant a new trial upon the merits, and on the ground of newly-discovered evidence. The motion is made under section 4 of chapter 339 of the Laws of 1859, which section is as follows, viz.:

“The Courts of Sessions of the several counties in this State shall have power to grant new trials upon the merits, or for irregularity, or on the ground of newly-discovered evidence, in all cases tried before them.”

The district-attorney opposes the motion, and insists that the section of the act just quoted has no application to this court. He argues that this is the Court of General Sessions of the Peace, in and for the city and county of New York; that it is an ancient court having an ancient title; that it is differently organized from Courts of Sessions in the other counties; that it has more extensive powers, and a clerk of its own, &c.; that the term “Court of Sessions,” contained in the act just quoted, applies only to courts bearing that name organized in other counties in the State under section 14 of article 6 of the Constitution of 1846; and that, even if the expression “Courts of Sessions” is comprehensive enough to include this court, it is apparent from the entire act, as well as from the act of April 17, 1847, which it in part repeals, that the Legislature did not intend its provisions to apply to it.

This court, under its former judges, has acted upon the assumption that it had the power, under the act of 1859, to grant new trials, and has, I believe, exercised the power; and the right has, I am informed, never before been disputed. If, therefore, the present objection is well taken, it overthrows the established practice of the court. I now propose to examine it carefully, and with as much brevity as is consistent with its importance, and the interest which it has excited among those who are accustomed to practise here.

The first question is, “Is the term ‘Courts of Sessions’ in the

act of 1859 comprehensive enough to include the Court of General Sessions, &c., in and for the city and county of New York?"

Courts of Sessions as such are of very ancient date. The literal signification of the word "Sessions" is sittings.

The learned Dr. Johnson, in his dictionary, defines Sessions to be "a meeting of the justices, as, Sessions of the Peace."

In Jacob's Law Dictionary is the following definition: "Sessions of the Peace,—a court of record held before two or more justices of the peace for the execution of the authority given them by their commission and certain acts of Parliament, and the justices of the sessions have power to hear and determine trespasses against the public peace, and many offences by statute."

Bacon, in his Abridgment, title "Courts of Sessions, &c.," says: "Sessions holden for the general execution of the authority of the justices of the peace, and which are usually holden in the four quarters of the year, are called 'General Sessions;' and Sessions holden on a special occasion for the execution of some particular branch of the authority of justices of the peace, are called 'Special Sessions;'" and he proceeds to state in regard to the organization of such courts as follows: "By statute, 34 Eliz., 3, ch. 1, it was enacted that two or three of the best reputation in the counties shall be assigned keepers of the peace by the king's commission, and at what time need shall be, the same, with others wise and learned in the law, shall be assigned by the king's commission to hear and determine trespasses and felonies done against the peace in the same counties, and to inflict punishment, &c."

Chitty, in his Criminal Law (vol. 1, ch. 4, pp. 133, 134), says: "The term Sessions of the Peace is used to designate a sitting of justices for the execution of those purposes which are confided to them by their commission and by several acts of Parliament; of these Sessions there are four kinds—Petit, Special, Quarter, and General." The same author says in another place: "The Sessions for the county of Middlesex and the cities of London and Westminster were governed by regulations differing in some respects from those which prevailed in other parts of the kingdom." I have quoted thus much from old authors for the purpose of showing two things: 1, the origin of Courts of Sessions and character of early legislation relating thereto, bearing,

The People v. Powell

as it does, so great a similarity to modern legislation ; and 2, the fact, that while all these courts, in whatever part of the kingdom they were situated, were spoken of and legislated about as Courts of Sessions, those in cities were under different regulations in some respects from those in other parts of the kingdom ; just as Courts of General Sessions in the city of New York, under the former Constitution, were differently constituted and in some respects differently regulated from the Courts of General Sessions in the other parts of the State ; and just as this court under the present Constitution is differently organized, and in some respects differently regulated, from Courts of Sessions in other parts of the State.

This court, now called the " Court of General Sessions of the Peace in and for the city and county of New York," assimilates in its character, jurisdiction, &c., to the English Courts of Sessions as above described, and is, whatever may be its peculiar designation, a " Court of Sessions." It originated with the Dongan charter (of 1686), which in section 8 declared, that the mayor and recorder, and three or more aldermen, not exceeding five, should be justices and keepers of the peace, &c., &c., and that they, or any three or more of them, whereof the mayor and recorder, or one of them, should for the time being be one, should have power, &c., to hear and determine, &c., all trespasses and offences whatsoever in said city of New York. It will be perceived that the charter gave no particular name to the court so constituted, but it was, in fact and in law, a Court of Sessions of the Peace, held in and for this city and county.

By the Montgomery charter (1730), (see section 26), it was provided that the mayor, deputy-mayor, recorder, and aldermen of said city for the time being, or any four or more of them, whereof the mayor, deputy-mayor, or recorder shall be one, shall, and may forever hereafter, hold and keep four Courts of General Sessions of the Peace in and for the said city and county of New York, to begin at certain times in the year, to wit, the first Tuesday of November, February, May, and August ; and jurisdiction was given them of all manner of felonies, &c. Let me here remark, that these courts so authorized were, like the Courts of Quarter Sessions in England, so called because held in each of the four quarters of the year. The charter does not create one court to be called " the Court

of General Sessions of the Peace in and for the city and county New York," but merely authorizes certain persons to hold four Courts of General Sessions of the Peace in and for the city and county; that is, it provides for the holding of a Court of General Sessions in that city and county four times a year. Kent, in his notes to the charter, says, "A succession of statute regulations have entirely superseded this section of the charter, and new-modelled the courts and enlarged their jurisdiction." He then cites the laws of 1787, 1788, 1798, 1800, &c., &c., and the act of April 9, 1813. By reference to the last act (1813), we see section 8 authorizes certain officers to hold "Courts of General Sessions of the Peace in the said city and county." Section 9 speaks of Courts of General Sessions of the Peace in and for the city and county of New York. Section 10 says the said court of "General Sessions" shall do certain things, &c.

The Court of General Sessions in this city and county has assumed the title which it now bears, and which it is claimed was derived from the Montgomery charter, but which (it is clear, on reference to said charter, and the acts just cited), when analyzed, means nothing more than that it is a Court of General Sessions, and that it is held in and for the city and county over which its jurisdiction extends, just as (as we shall hereafter see) under the Constitution of 1821 there were Courts of General Sessions held in and for the county of Westchester, &c., or the county of Orange, &c.,—all of them being Courts of Sessions held in and for their respective counties.

Having taken this review of the origin and character of the Courts of Sessions, and of the origin of the Court of Sessions in and for this county, let us glance at some of the legislation under the Constitution of 1821 relating to Courts of General Sessions, and see whether, in any thing which relates to the character of the courts, any distinction has been taken, and whether the Legislature in any way indicated that any act relating to Courts of General Sessions, *eo nomine*, would not as well apply to this court as to the Courts of General Sessions in any other part of the State.

By the Revised Statutes (see 3d edition, top paging 274), any three judges of the County Courts of each of the counties of the State, except the county of New York, were empowered to hold Courts of General Sessions in their respective counties; and the

statute then proceeded to enumerate the powers of such court. It, among other things, provides that the clerks of the several counties (except the city and county of New York) shall be the clerks of the Courts of General Sessions.

Then on page 288 (same volume), it provided that the first judge of the County Courts of the city and county of New York, and the mayor, recorder, and aldermen of said city, or any three of them, &c., of whom the first judge, mayor, or recorder should always be one, should have power to hold "Courts of General Sessions" in and for the said city and county of New York: that said court should possess like powers with "Courts of General Sessions" for the other counties in the State (and when the first judge should preside, certain additional powers).

The clerk of the Court of Oyer and Terminer and General Sessions of the Peace in and for the city and county of New York was appointed by, and held his office at the pleasure of, the said Court of General Sessions of the Peace in that city. (1 *Rev. Stat.*, 3d ed., 111.)

Two things should be noticed in this connection: 1st. The different organization of the General Sessions in New York and in the other counties, as to judge, clerk, &c.

2d. The fact that the court in New York is called in one place (*Rev. Stat.*, 288) the Court of General Sessions in and for the city and county of New York, and in the other place (1 *Rev. Stat.*, 111) by its more full title of Court of General Sessions of the Peace in and for the city and county of New York,—the Legislature having here used, as they have repeatedly used since, the expressions indiscriminately.

Now if, under this state of law, an act had been passed authorizing Courts of General Sessions in the several counties in the State to grant new trials, &c., would it have been claimed that such an act did not, by its very terms, entitle the Court of General Sessions, as organized in the city and county of New York, as well as Courts of General Sessions in and for the county of Westchester, &c., and any in other parts of the State? I think not. And yet the same arguments used now would have been applicable then, viz.: That the court here was differently constituted from what it was in other counties, and that it had enlarged powers; that it had a clerk of its own, and had a distinct name derived from the Montgomery charter, viz.: The

Court of General Sessions of the Peace in and for the city and county of New York. The answer to this would have been, that it was, nevertheless, a Court of General Sessions, nothing more and nothing less, and would be included in any general legislation relating to courts by that name.

We will pass over much of the legislation relating to these courts, and only say that thus the law was, in substance, when the Constitutional Convention of 1846 assembled; and it is under the Constitution of 1846 that the district-attorney now claims that new courts, called "Courts of Sessions," were created in counties other than New York, as contradistinguished from the Court of General Sessions in that city and county, and which new courts alone are affected by legislation relating to Courts of Sessions *eo nomine*. Is this so? Let us look, first, at the proceedings of the convention which framed the Constitution, and at the instrument itself; second, at legislative interpretation of it since.

First, then, as to the proceedings of the convention which framed the Constitution of 1846, and the Constitution itself.

It may be premised, that the great object of Courts of Sessions was then, as it is now, to relieve the Oyer and Terminer of a large amount of criminal business, just as the object of county and other local courts was to relieve the Supreme Court of civil business. In the convention, several different plans of a judiciary system were submitted by as many different members of the Committee on the Judiciary. After much discussion of the various plans, Mr. Crooker, of Cattaraugus county, on the 19th of August, submitted certain additional sections to the report of the Judiciary Committee, providing for the organization of County Courts, &c. One section was as follows: "There shall be elected in each of the counties of the State, except the city and county of New York, a county judge, &c.;" and in another section it was provided as follows: "The county judge, with two justices of the peace, to be annually designated by the Board of Supervisors, shall hold Courts of General Sessions for the trial of all offences punishable by imprisonment in the state-prison for a term not exceeding ten years, &c." The proposition was the basis of the present system of County Courts and Courts of Sessions in counties other than the county of New York. Mr. Jordan, in an able speech, favored this

plan, assigning, among other reasons, that the majority of the committee had not provided for any court of criminal jurisdiction except the Oyer and Terminer, and he was fully satisfied that with the aid proposed by Mr. Crooker to relieve the Supreme Court of "Sessions business" (mark the language, "Sessions business"), the judges of the Supreme Court would be amply able to do all the other business of the court. (*Croswell & Sutton's Debates of Convention*, 512, 514.) Mr. Jordan subsequently (see *Ib.*, 555) indicated an amendment he desired to offer, viz., to leave the jurisdiction of the Court of General Sessions more to the control of the Legislature.

Subsequently, Mr. Swackhammer, of New York (*Ib.*, 596), asked Mr. Crooker in debate why, in providing for the election of a county judge, he excepted the county of New York. Mr. Crooker responded, that one judge would not be sufficient for New York, and he intended to make provision for such cities in a subsequent section.

The question and answer are worthy of note, because provision was made for New York in a subsequent section, and not another word was dropped in this debate indicating any intention of making any distinction between New York and the other counties, except this declaration, that more judicial force would be required in New York to organize the same character of courts, and do the same class of business. After considerable debate Mr. Crooker's proposition, with some alteration, was adopted. Mr. Jordan's amendment, as above suggested, was embraced in it, and the section relating to Courts of Sessions read as follows: "The county judge, with two justices of the peace, may hold 'Courts of Sessions' with such criminal jurisdiction as the Legislature may prescribe." It will be perceived that the word "General" before "Sessions" was dropped; why it was dropped does not appear, as no allusion whatever was made to it in the debate. It is enough to know, that the effect of the section was not in direct terms to establish a court of that particular name, but to authorize certain judges, in counties other than New York, to hold Courts of Sessions for the transaction of criminal business, in place of the old Court of General Sessions, as provided for by law, under the Constitution of 1821; and the omission to use the word "General" was not for any especial reason, but because, in the connection in which

the words were used, Sessions and General Sessions meant the same thing.

So much for the proceedings of the convention up to this point. On this question New York city and county yet remained to be provided for, and it was done by section 12 of the last article of the Constitution, which is as follows :

“ All local courts established in any city or village, including the Superior Court, Common Pleas, *Sessions*, and Surrogate's Courts of the city and county of New York, shall remain, until otherwise directed by the Legislature, with their several powers and jurisdiction, &c., &c.” Observe, it does not say, “ The Court of General Sessions of the Peace in and for the city and county of New York ;” but merely, “ *Sessions*.” The same word exactly as is used in the prior section in relation to other counties. This identity of language is remarkable, if it was intended to recognize or create any distinction in character between this Court of Sessions and Courts of Sessions in other counties. It seems clear to me such was not the intention, but that they were all considered courts for the transaction of Sessions business ; and, whether in city or country, were included in the general term of “ Courts of Sessions,” with such powers as the Legislature might confer.

But the learned district-attorney urges the differences which actually exist, as we have before mentioned. He says this court is differently constituted from Courts of Sessions in the other counties, that it has a clerk of its own, and a name peculiar to itself. So is the Oyer and Terminer in this city and county differently constituted from what it is in other counties. Here it is held by a single judge of the Supreme Court ; elsewhere, by a judge, aided by the county judge and two justices of the Sessions, or any two of them, of whom the Supreme Court judge must be one. Here it has a clerk of its own ; elsewhere, the clerk of the county is the clerk of the Oyer and Terminer. Here it is frequently spoken of by the Legislature as the Court of Oyer and Terminer in and for the city and county of New York. Yet I do not believe it would be contended that an act, authorizing Courts of Oyer and Terminer in the several counties of this State to grant new trials, would not apply to the city and county of New York as well as other counties ; and as to the peculiar and ancient title of the court, we

have seen that it was not always so designated by the Legislature, prior to 1846; that it is not preserved *eo nomine* by the Constitution of 1846; and we shall show directly that it is not always so designated in subsequent legislation, even when applied to it especially, either in the Charter of 1857 or in other acts.

It is undoubtedly true that there has been considerable legislation in regard to this court specifically, and that it is frequently and generally, though not always, spoken of in acts of the Legislature as "The Court of General Sessions of the Peace in and for the city and county of New York." I think, however, nothing can be argued from that. In the Charter of 1857, § 48, the court is spoken of simply as what I have attempted to show it to be—a "Court of General Sessions," nothing more or less. That section provides "that no alderman shall hereafter sit or act as a judge of the Court of Oyer and Terminer, or in the Courts of General or Special Sessions in the city and county of New York." And it further provides, that "the Court of General Sessions in and for the said city and county may be held by the recorder or city judge. In neither of these provisions is this court spoken of by the especial title of "The Court of General Sessions of the Peace in and for the city and county of New York."

In the Judiciary Act of 1847, to which the district-attorney has referred as supporting his views, it is, among other things, provided as follows (§ 112): "Courts of Sessions, except in the city and county of New York, shall be held at the time and place at which County Courts for the trial of issues of fact are appointed to be held," &c. Now, if there was no "Court of Sessions," in the city and county of New York, this exception was wholly unnecessary and without meaning. If there was a Court of Sessions, it must have been this court, which alone answers the description.

Again, in the Code of Procedure adopted in 1848 (*Laws of 1848*, 497, § 9), the Legislature declared what courts of justice existed in this State, and also declared that the courts there mentioned should continue to exercise the powers then vested in them respectively, except as otherwise prescribed by the act. The following are the courts thus declared by the Legislature to exist in the State, viz., the Court for the Trial of Impeach-

ments, the Court of Appeals, the Supreme Court, the Circuit Court, the Court of Oyer and Terminer, the County Courts, the Courts of General Sessions of the Peace, the Courts of Special Sessions, the Surrogates' Courts, the Courts of Justices of the Peace, the Superior Court of the City of New York, the Court of Common Pleas for the City and County of New York, the Mayors' Courts of Cities, the Recorders' Courts of Cities, the Marine Court of the City of New York, the Assistant Justices' (District) Courts in the City of New York, &c. Now, it will be recollected, this was only two years after the formation of the Constitution of 1846, and yet no mention is here made at all of Courts of Sessions, *eo nomina*; on the contrary, the words are "General Sessions of the Peace." And the same designation is kept up in section 38, which provides "that no grand or petit jury shall be summoned for any court of 'General Sessions of the Peace,' except in the city and county of New York, unless so directed by the Board of Supervisors of the county."

In 1849 the Code was amended, and in the section declaring what courts exist in the State, the words "Courts of Sessions" are substituted for "Court of General Sessions of the Peace." No mention whatsoever is made of this court by name, although all the other courts in this city are named specifically.

Can it be the Legislature intended to ignore the existence of this court? Certainly not. But it was recognized in the general designation of "Courts of Sessions," and thus declared it to be what I have attempted to show it to be, a "Court of Sessions," nothing more and nothing less. The Legislature having thus in effect declared this court to be included in the class of "Courts of Sessions," and the act containing that declaration being in full force, how can it be claimed that in subsequent legislation relating to Courts of Sessions (without exception), this court is not included?

Certainly such a proposition cannot be maintained, unless there is something in the particular act itself which shows an intent to except this court from its provisions. And here I may say that the learned district-attorney has substantially admitted the truth of this proposition in one of his points, in which he refers to the act of the Legislature, passed April 9, 1859, entitled "An Act to empower Courts of Sessions in the several counties of the State to extend their terms, and authorizing

certain adjournments of such courts," and which, among other things, declares as follows :

"Section 1. It shall be lawful for the Court of Sessions of any county of this State to continue its sittings at any term thereof as long as it may be necessary, &c."

This court has always assumed that this act applied to it, and has accordingly continued its sittings from time to time in accordance with its provisions, and, I think, properly so.

Now, in regard to this act, the district-attorney says : "When called upon in this county to find a Court of Sessions, lest the statute fail and its object fail, the Court of General Sessions of the Peace in and for the city and county of New York may be and must be seized upon."

I repeat, that I take this proposition as admitting that the term "Courts of Sessions" is comprehensive enough to include this court. The district-attorney says, that in the act last mentioned the words "*any* county" are used, and that *any* means *every*; while in the New Trial Act the words are, "the Courts of Sessions of the several counties;" that is, he says, the counties in which the "constitutional Courts of Sessions exist." I am unable to see any force in this distinction. The Legislature has not made any, for I notice that in the title of the Term Extension Act the Legislature uses the words "several counties," although in the body of the act they say "*any* county." The truth is, that Courts of Sessions, "Courts of General Sessions," and Courts of General Sessions of the Peace, are expressions all of which designate the same class of courts; and, as it was remarked by Judge Gridley in the case of *The People a. Hawkins* (5 *How. Pr.*, 1), "A few citations from our statutes will show how unimportant the exact or more uniform designation of courts has always been deemed in this State." Thus, in the Constitution of 1777, the Supreme Court of Judicature is designated simply as the Supreme Court. In the statutes it is called the Supreme Court, the Supreme Court of Judicature, the Supreme Court of Judicature of the People, &c. In the Constitution of 1821 it was designated as "the Supreme Court," simply. In one place in the Revised Statutes it was called "The Supreme Court of Judicature;" in another place, process was made returnable before "The Justices of our Supreme Court of Judicature;" and in another case it was provided, that in all pleadings

The People *v.* Powell.

and records the style should be "before the Justices of the Supreme Court of Judicature of the People of the State of New York." In the case of *The People v. Hawkins* (*supra*), Judge Gridley, of the Supreme Court, decided that a bond conditioned for the appearance of one Clark at the next Court of General Sessions of the Peace (instead of Court of Sessions), to be held in Oneida county, was forfeited by the non-appearance at the next "Court of Sessions;" and this case is cited with approval in *Baldwin v. McArthur* (17 *Barb.*, 414).

Let us now consider the second question, viz.: Is there any thing in the act itself now under consideration which indicates an intention on the part of the Legislature to exclude this court from its application?

Much has been said against the policy of conferring upon criminal courts the power to grant new trials upon the merits. There are certainly many reasons against it, and much may be said on both sides. But I can see no good reason, if the power is to be given at all, why it should not be given as well to this court as to any Court of Sessions in the State. But it is claimed, that it is apparent from the act itself that it was not intended to embrace this court in its provisions, because, 1st. The act of April 17, 1857, which it in fact repealed, had especial reference to courts out of the city and county of New York, &c.; 2d. Because some parts of the act itself are wholly inconsistent with the idea that it was intended to apply to this court.

It is not so clear that the provisions of the act of 1857, relating to "Courts of Sessions," did not, whenever the same could be applied, embrace this court. The title of the act of 1857 is important in this connection. It is an act "defining the powers and duties of Courts of Special Sessions, except in the city and county of New York and the city of Albany, and Court of Sessions, and regulating appeals in criminal cases." The exception in the title, it will be observed, applies only to the Courts of Special Sessions. Then in its first section it continues this exception thus: "Courts of Special Sessions, except in the city and county of New York and Albany," shall have power, &c. The same exception is kept up in the second section. It is dropped in the third section, which is as follows: "The Courts of Sessions of the several counties in this State, in addition to the several powers now possessed, shall have the following powers,"

&c., among others, the power to grant new trials. Now, it is evident it was not intended to limit this section to the particular counties, the Special Sessions in which had been treated of in prior sections; if it had been the same, exception would have been noted. The argument that no constitutional Court of Sessions existed in New York, and therefore no exception was necessary, would not apply to the county of Albany, in which said constitutional court did exist; and the exception of that county in terms was necessary, if the Legislature intended to except it from this provision, as it did from the provisions relating to "Special Sessions." I do not hesitate to say that so much of the act of 1857, as authorized Courts of Sessions in this State to grant new trials on the merits, applied to and embraced this court. All of that act, however, except so much thereof as defines the powers, &c., of Courts of Special Sessions in counties, except New York and Albany, has been repealed by the act of 1859, under the last section of which this motion is made, and which section I quoted in the first part of this opinion. This act of 1859 is entitled "An Act in relation to Courts of Special Sessions, Courts of Sessions, and Police Courts." In this title, it will be perceived, no "exception" is contained. The first section repeals all the act of 1857, just referred to, except the first and second sections, which two sections, be it remembered, are those which define the powers of Special Sessions, except in New York and Albany. The act of 1857 contemplating no exception except in its provisions relating to the powers of Special Sessions, and those provisions being retained, there was no further necessity of noting any exception of New York or Albany in the act of 1859, and that act, therefore, neither in its title or its sections, makes any exception of any courts whatever in terms. And the only thing upon the face of this act which shows it in any way inapplicable to this court is, that section 3, relating to certioraris to Courts of Special Sessions, declares that the writ, affidavit, and return shall be filed in the office of the county clerk, he being clerk of sessions in counties other than this; whereas it should have been in case of a certiorari from this court, if the section was intended to apply to it, filed in the office of the clerk of this court.

Whether this omission is to be construed as indicative of an intent to except this court from the operation of that section, or

whether it is one of those blundering omissions not uncommon in the history of legislation, is questionable. If it was intended as an exception, I can only say it would have been much easier to have made the exception in plain words.

I do not, however, consider it important, for the fourth section stands by itself, and does not depend, in any sense, upon the others for its force or construction. It declares that Courts of Sessions of the several counties in this State (no exceptions) shall have power to grant new trials, &c.; and if I am right in my conclusion, that the words "Courts of Sessions" are broad enough to include this court, it is plain enough, to my mind, that there is nothing in the act itself to exclude it.*

I will, therefore, hear counsel upon the merits of this motion.

* In the *MATTER OF MARKS* (*Supreme Court, First District, Sp. T., February, 1862*), a contrary view of the question was suggested.

That was a case of an application for a certiorari and habeas corpus to the Special Sessions, under the act of 1859, ch. 339; the second and third sections of which, relating to certiorari, are above referred to. The application was refused, on the ground of doubt as to the construction of the statute.

The opinion rendered was as follows:

CLERKE, J.—To say the least, very great doubt exists whether the act of 1859 (ch. 339) applies to the New York Courts of Special Sessions and the Court of General Sessions of the Peace in and for the city and county of New York. The latter is a court created by the Montgomery charter; in the Constitution of 1821 it is specifically recognized. By the Constitution of 1846, courts of criminal jurisdiction in counties are termed Courts of Sessions, and are composed, by a provision of that Constitution, of a county judge and two justices of the peace, and the county clerk is *ex officio* the clerk of the Sessions; whereas the Court of General Sessions for the city and county of New York is composed of one judge (either the city judge or recorder), specially elected for that purpose alone, and has a clerk specially appointed. This distinction has been frequently recognized by the courts; and now, as well as when the case of *The People v. Goodwin* (18 *Johns.*, 206) was before the Supreme Court, is clothed with powers not intrusted to the Sessions of any other county. I therefore think it would be unwise for a justice of this court to grant a certiorari and take a recognizance in a case of this description.

We certainly have business enough without assuming doubtful powers or jurisdiction. This is more especially inexpedient, when we consider that a party convicted at the Special Sessions can have his case reviewed in the General Sessions without our intervention. He may appeal to the Court of General Sessions, as prescribed by the article relative to trials before Courts of Special Sessions in the city and county of New York. (3 *Rev. Stat.*, 5 ed., 1009, § 52.)

The writs of certiorari and habeas corpus must be, therefore, quashed, and the prisoner remanded.

This decision is made without prejudice to the right of the prisoner to apply to the Court of General Sessions for a writ of certiorari, &c.

Ward a. Kelsey.

WARD a. KELSEY.

Supreme Court, First District; Special Term, November, 1861.

INJUNCTION.—SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF LAND.

An injunction will not be granted, before judgment, for any purpose which can be attained by other ordinary process of the law.

It ought not to issue for the purpose of restraining a judicial officer from transcending his jurisdiction; a writ of prohibition being the proper remedy in such a case.

It should not require the performance of any act, but only forbid performance.

It seems, that summary proceedings to recover possession of land can be restrained by injunction, only when they are used as means of fraud.

Motion to dissolve injunction.

The action was brought by R. M. Ward, W. S. Gove, and E. P. Morris, against Charles Kelsey.

S. Sanxay, for the plaintiffs.

BARNARD, J.—The complaint in this case prays for a decree of specific performance against defendant, and for an injunction restraining defendant from continuing a nuisance (to wit, permitting a sunken crib to remain), and from molesting or annoying plaintiffs in the use and enjoyment of a pier and franchise; and from taking or instituting any proceedings, or carrying on any proceedings, to remove or oust plaintiffs from said pier, or any part thereof, or an alleged unfinished addition to said pier, or any part thereof; or from doing any act or thing to molest or disturb plaintiffs in the enjoyment thereof, except to finish the same according to an agreement mentioned in the complaint.

A temporary injunction, to the effect as prayed for in the complaint, has been issued. Defendant now moves its dissolution.

The only proceedings or interference which it is alleged defendant contemplates, is the taking proceedings under the stat-

ute giving proceedings, familiarly known as "Summary Proceedings," to dispossess plaintiffs for non-payment of rent.

The injunction, so far as regards these proceedings, is sought to be sustained on the following grounds:

1. That the relation of landlord and tenant cannot exist as to a pier, and therefore a magistrate has no jurisdiction under the Summary Proceedings Act.

2. That the pier is situate in the city of New York, and therefore a magistrate in Brooklyn (before whom defendant had instituted proceedings) has no jurisdiction.

3. That no rent is due, inasmuch as, by the agreement, rent was not to commence till the addition to the pier (which addition was the subject of the demise) should be completed pursuant to the contract, which addition it is alleged is not so completed.

4. That plaintiffs have suffered damage far exceeding the rent, which they cannot recoup in summary proceedings under the statute.

5. That plaintiffs showing a right to a decree of specific performance, and the threatened acts of defendant being such as to place serious obstacles in the way of executing, if not to render wholly nugatory, a judgment for specific performance, the court will retain the injunction as an aid to the principal relief.

As to the 1st, 2d, and 3d grounds: It is an established principle of equity, that where a perfect remedy exists at law, or where, in an action at law, defendant can present his defence, there an injunction will not issue. There has been no change of this principle effected by the Code. Now, as to the 1st and 2d grounds, there is an ample remedy at law by the writ of prohibition, which issues when an inferior magistrate is about to, or has exceeded his jurisdiction. And as to the 3d ground: if the alleged facts exist, viz., that rent was not to commence till the addition should be completed pursuant to contract, and that such addition is not yet completed, these facts would undoubtedly constitute a perfect defence to the summary proceedings.

As to the 4th ground, it may be that unliquidated damages cannot be recouped in summary proceedings, but still they may be recovered in an action at law brought against defendant; and when that is the case, another element must exist before an injunction will issue to restrain a party from prosecuting an

Ward a. Kelsey.

action to collect a demand against which there exists in favor of the debtor a claim for unliquidated damages that cannot be recouped in such action; and that element is the irresponsibility of the party so prosecuting the action. No such irresponsibility of defendant Kelsey is suggested; on the contrary, it is alleged, and not denied, that the plaintiffs are irresponsible, and that if defendant succeeds in this action, he will, by reason of such irresponsibility, lose his claim.

As to the 5th ground: from the pleadings and affidavits submitted, this does not appear to me to be one of those cases in which the court will decree a specific performance; and for this reason, although the trial of the cause may produce a different result, a temporary injunction cannot be retained on this ground. But even conceding a case for a specific performance to exist, still this court is prohibited from restraining summary proceedings by the statute. The statute expressly provides: "The Supreme Court may award a certiorari, for the purpose of examining any adjudication made on any application hereby authorized; but the proceedings on any such application shall not be stayed or suspended by such writ of certiorari, or any other writ or order of any court or officers." The provision is imperative. It absolutely prohibits all interference whatever with any application authorized by the statute or the proceedings thereon.

It necessarily also extends to a contemplated application before it is actually made; for it would be a sheer violation of the statute, to hold that a party could be restrained from making the application, when, if he had made application, he could not be restrained from proceeding thereon. Such a doctrine would render the statute nugatory.

It will be observed, that the provision only refers to applications authorized by the statute. It consequently does not interfere with the issuing of a writ of prohibition, on the ground of a want of jurisdiction; as such writ must necessarily issue on the assumption that the proceeding is not authorized by the statute. So, too, when fraud pervades the proceedings themselves, an injunction may, perhaps, issue on the ground that a fraudulent proceeding is not authorized by the statute. These, however, are the only two instances in which any court or officer can interfere.

Skinner *v.* Oettinger.

Now, in this case, no fraud in the proceedings themselves is alleged. A want of jurisdiction, it is true, is alleged. That, however, is, as above suggested, to be reached by a writ of prohibition, and not by injunction. The temporary injunction, however, restrains defendant from continuing a certain alleged nuisance or obstruction. Obedience in this respect can only be by removing the obstruction.

This removal is part of the specific performance prayed for.

If obedience to this temporary injunction in this respect is to be enforced, one part of the specific performance is obtained without a trial. If that can be done as to one thing, it may as to all, and so all cases of specific performance be determined on a motion without a trial.

If obedience is not to be enforced before trial, then this injunction should not stand. A temporary injunction should only be issued to *prevent* an act, not to *compel* the performance of one.

Motion granted, with \$10 costs.

SKINNER *v.* OETTINGER.

Supreme Court, First District; General Term, November, 1861.

ATTACHMENT.—FRAUDULENT DISPOSITION OF PROPERTY.

An attachment may issue under the Code against the property of a debtor who has made a fraudulent assignment for the benefit of creditors, although the assignment is valid on its face under the law of 1860.

It is not necessary that the plaintiff in the action in which such attachment is issued should be a judgment-creditor.

The decision of a judge before whom a motion is made, upon conflicting evidence, is conclusive, so far as questions of fact are concerned.

Appeal from an order denying a motion to set aside an attachment.

The action was brought by Francis Skinner and others against J. N. Oettinger and L. Goldstein. Upon affidavits showing that the defendants had assigned all their property for the

Skinner & Oettinger.

benefit of creditors, giving preferences to certain persons, some of whom were their relatives, and tending to show that the assignment was fraudulent, plaintiff obtained an attachment. On affidavits denying fraud, the defendants moved to set aside the attachment. The motion was denied at special term, and the defendants appealed.

A. I. Dittenhoeffer, for the appellants.—I. There is no allegation that the assignment is void upon its face. No judgment had been obtained by plaintiffs. It will not be denied that a judgment must be obtained before a creditor's bill can be maintained. (Andrews *a. Durant*, 18 *N. Y.*, 496; Hall *a. Stryker*, 9 *Abbotts' Pr.*, 342.) The word "assigned" in the Code cannot have been intended to include general assignments for the benefit of creditors. If so, it virtually annuls the statute regulating the making thereof. (See Hall *a. Stryker*, *Ib.*, 350.) The case of Schlusel *a. Willett* (12 *Ib.*, 397; S. C., 34 *Barb.*, 615) is unlike this. In that case a judgment had been obtained a year before, which was the foundation of the attachment. Besides, the court held the assignment void upon its face, and recognized the authority of Hall *a. Stryker*.

II. Should the court, however, look into this case, then the question arises how far they will do so. This court has held that, "on a motion to vacate an attachment, the plaintiff's affidavits in opposition are to be received only for the purpose of explaining or contradicting the moving affidavits; and unless the attachment can be sustained on the original affidavits, it should be discharged." (Wilson *a. Britton*, 6 *Abbotts' Pr.*, 33; Dickenson *a. Benham*, 10 *Ib.*, 390.) If property is to be taken from the possession of third persons, before judgment and execution against the principal, without giving the third party an opportunity of being heard, on mere *ex-parte* affidavits, then the most clear and explicit facts should be given to the court, upon which the attachment is asked. The affidavits should be made upon positive knowledge, if possible. When positive knowledge is not given, the reason why should be given. (3 *Sandf.*, 703; 13 *How. Pr.*, 348.)

G. A. Seixas, for the respondents, cited Schlusel *a. Willett* (12 *Abbotts' Pr.*, 397).

Skinner *v.* Oettinger.

BY THE COURT.*—SUTHERLAND, J.—This action was not commenced to set aside the assignment as fraudulent, but to recover a judgment for an alleged debt. The action was not commenced, nor does it proceed upon the theory, that the plaintiffs had a lien upon the assigned property, or any better right to it, originally, and before the attachment was levied, than any other simple contract-creditor.

The only question of law there is in the case is, whether a fraudulent disposition of property, by way or under color of an assignment for the benefit of creditors, is or can be a fraudulent disposition of property within the Code, so as to authorize the issuing of an attachment under the Code.

The language of the Code is general and broad enough to include any and every fraudulent disposition of property.

The attachment issues, not because the plaintiff has a lien on the specific property alleged to have been fraudulently disposed of, but to acquire a lien as a provisional security for the payment of a judgment to be recovered.

Assuming the assigned property, seized under the attachment, to be, at the time of such seizure, in the possession of the assignees, the sheriff takes it at his peril, and he need not take it without being indemnified by the plaintiff. If the plaintiff indemnifies the sheriff, he indemnifies him at the peril and risk of being able to show the assignment to be fraudulent and void, in an action brought against the sheriff for the taking.

The plaintiff takes and enforces the provisional remedy at his peril. I repeat, the question is not as to the plaintiff's right to remove or set aside a fraudulent obstruction to the enforcement of a judgment and execution, but his right to a provisional statutory security for the payment of his debt, when he shall have obtained a judgment.

Upon sufficient evidence, then, that the assignment by the defendants was fraudulent, the attachment in this case might properly and regularly have been issued on that ground alone.

Upon the question of fact, on the motion to vacate the attachment, whether the defendants, by the assignment or otherwise, had made a fraudulent disposition of their property, there were

* Present, SUTHERLAND, CLERKE, and BARNARD, JJ.

Schieffelin *a.* Hawkins.

evidence and circumstances on both sides to show the fraud, and to contradict the charge of fraud.

This evidence and these circumstances were submitted to the judge who heard the motion, and his decision on this question of fact must be and ought to be held conclusive.

The order appealed from should be affirmed, with \$10 costs.

CLERKE and BARNARD, JJ., concurred.

SCHIEFFELIN *a.* HAWKINS.

New York Common Pleas; Special Term, March, 1862.

SET-OFF.—ASSIGNEE FOR BENEFIT OF CREDITORS.—VALUABLE CONSIDERATION.

An assignee for benefit of creditors is not entitled to the same favor in equity as a purchaser for a valuable consideration. He acquires no better title than his assignor had.

In cases of cross-indebtedness arising out of mutual dealings, either party is entitled, upon a liquidated debt to him becoming due, to have it set off against debts which he owes to the other party.

This right may be enforced against an assignee for the benefit of creditors, if the contract creating the debt had been executed, so that the assignor's liability had been fixed before the assignment was executed.

Motion for judgment on demurrer to complaint.

The action was brought by Schieffelin, Dix, Gellatly & West-erfield against R. C. Hawkins, assignee, and P. and A. Duclos. The complaint set up facts which appear fully in the opinion of the court.

D. A. Hawkins, for the demurrer.—To entitle plaintiffs to the set-off, their claim against the assignors must, at the time of the assignment, have been a matured claim—one on which a suit at that date could have been brought against the assignors. Not being, then, a matured claim, but only an obligation or contract, running to maturity at a day subsequent to the assignment, it cannot be set up against the claims vested by the

Schieffelin *v.* Hawkins.

assignment in the assignee, but those claims must be paid in full to the assignee, and then plaintiffs, like other creditors, must take their pro-rata dividend from the assignee. (*Haxtun v. Stevens*, 3 *Wend.*, 23, *note*; *Myers v. Davis*, 22 *N. Y.*, 489.)

E. & E. F. Brown, opposed.—I. It is not disputed that there were mutual demands existing between the plaintiffs and the assignors at the time of making the assignment, and were it not for the assignment, this action could clearly be maintained as against the assignors. The case of *Lindsay v. Jackson* (2 *Paige*, 581) would be precisely in point, if the suit was brought against the assignors.

II. The plaintiffs' rights have not been changed by the assignment. (*Maas v. Goodman*, 2 *Hill.*, 275; *Receiver v. Patterson Gas Light Co.*, 3 *Zabr.*, 283.) The doctrine of *Myers v. Davis* (22 *N. Y.*, 489), does not apply, for it is apparent that no legal demand existed in favor of the defendants when the assignment was made.

DALY, F. J.—This action is brought to compel an equitable set-off of cross-claims arising as follows: On the 22d of May, 1860, the defendants Duclos & Co. bought of the plaintiffs a bill of goods amounting to \$1,253.52, for which they gave the plaintiffs their promissory note, payable in six months. About a fortnight before the note became due, that is, on the 9th of Nov., 1860, the plaintiffs purchased of Duclos & Co. a bill of goods amounting to \$1,593.23, upon a credit of six months, the principal part of which consisted of the same goods which Duclos & Co. had purchased of the plaintiffs, and for which the note above referred to was given; and in a week afterwards, that is, on the 15th of November, 1860, Duclos & Co. made a general assignment to the defendant Hawkins for the benefit of creditors.

When the assignment was made, neither of the cross-demands were due. The note of Duclos & Co. fell due ten days after the assignment, while the claim against the plaintiffs did not mature until nearly six months afterwards. When it fell due, the plaintiffs brought the present action to restrain Hawkins from assigning or disposing of it, and, as it exceeds the note in amount, that so much of it as will suffice may be set off against,

Schieffelin *v.* Hawkins.

and in extinguishment of, the note. The defendant Hawkins demurs to the complaint, and the plaintiffs move for judgment on the demurrer.

This is a case of cross-indebtedness growing out of mutual dealing, and in such a case a court of equity, especially where one of the cross-debtors is insolvent, will always interpose, setting off one debt against the other, and adjudging the balance to be the sum which is equitably due. (Lord Lanesborough *v.* Jones, 1 *P. Wms.*, 230; Hawkins *v.* Freeman, 2 *Eq. Cas. Abr.*, 10; Pond *v.* Smith, 4 *Con.*, 302; Robbins *v.* Hawley, 1 *Monroe*, 194; Lindsay *v.* Jackson, 2 *Paige*, 581; *Story's Eq. Jur.*, § 1436.)

This power existed in courts of equity before any statute of set-off was passed. (Anon., 1 *Mad.*, 215.) "Set-offs were allowed," says Chief-justice Ewing, in *The State v. Welslead* (6 *Halst.*, 398), "satisfying one demand by means of another, not because of the statute, but because it was incidental to the due administration of the law, and flowing from the right to control suitors to such a course as is demanded by equity and justice; . . . but this extraordinary power will be exercised only where demands are fixed and ascertained." It is not sufficient, however, that a demand is liquidated or ascertained. Before the court will order it to be set off, it must also be due. Thus, it was held by the Court of Appeals, in *Bradley v. Angel* (3 *N. Y.*, 475), that a set-off would not be ordered in equity where the cross-demand against an insolvent was not yet due—the reason for which is obvious. The insolvent is entitled to the full period of credit; and until he is bound to pay the debt, a debt due to him cannot be set off against it. Whatever may be the effects of his insolvency, the court cannot change the contract of the parties. But where the debt owing to the insolvent has become due, it is not necessary to wait until the cross-claim is payable, as the continuance of the credit in that case is a matter solely for the benefit of the other party, which he may, if he think proper, waive. (Lindsay *v.* Jackson, 2 *Paige*, 581.)

In the present case, neither of the cross-demands were due when Duclos & Co. made their assignment, though the amounts respectively owing by each were then ascertained and fixed. Now, however, that they are due, and that this application is

made to the equitable power of the court to set off the one against the other, the question arises whether the right which would otherwise exist has been lost by the transfer of the claim against the plaintiffs to Hawkins.

In *Chance a. Isaacs* (5 *Paige*, 592), Chancellor Walworth declared that when a demand is not due at the time of an assignment, but will become due before the cross-demand, an equitable right of set-off exists, of which it would be unconscientious to deprive the other party by assigning the claim against him to an assignee for the benefit of creditors; but the point arose incidentally, and was not essential to the decision of the case.

The question, however, came up directly before the Superior Court, in *Keep a. Lord* (2 *Duer*, 78), a case that differed from the present only in the circumstance that the cross-demands there were independent and disconnected, while here they grew out of mutual dealings, a distinction which is not material,—it being well settled that the insolvency of one of the cross-debtors, even where the demands are independent and disconnected, is a sufficient ground in equity for compelling a set-off. (*Merritt a. Fowler*, 6 *Dana*, 306; *Robbins a. Hawley*, 1 *Monroe*, 194; *Pond a. Smith*, 4 *Con.*, 302; *Simpson a. Hart*, 14 *Johns.*, 63; *Lindsay a. Jackson*, 2 *Paige*, 581; *Rawson a. Samuels*, 1 *Craig & Phillip*, 161.)

In this case of *Keep a. Lord*, the opinion of Chancellor Walworth was considered and dissented from; and it was there held that as the claim against the insolvent was not due when he made his assignment for the benefit of creditors, that the assignee took the cross-demand divested of any right on the part of the solvent debtor to set off against it the claim owing by the insolvent when that claim became due. The ground taken by the court was, that the right of set-off must attach at the time when the assignment is made; that it did not attach then, as neither of the claims were due, and could not arise afterwards when they did become due, as the claim against the plaintiff had passed before that event to the assignee. A similar decision growing out of the assignment in the present case was pronounced by Mr. Justice Hoffman, sitting at the special term.

In *Maas a. Goodman* (2 *Hill.*, 275), the general term of this court, reversing a decision at the special term, dissented from the view taken by the Superior Court in *Keep a. Lord*, and held

in an action brought by an assignee for the benefit of creditors, to recover for a bill of goods sold by the insolvent before his assignment to the defendants, that the defendants were entitled to set off a note made by the insolvent, and held by them when the bill of goods was sold to them, though the note was not due or payable until several months after the assignment. In that case, as in this, the debt owing by the insolvent became due before the cross-demand.

Since that decision was made, the case of *Myers v. Davis* (22 *N. Y.*, 489), has been decided in the Court of Appeals, a case relied upon by the defendant Hawkins as in conflict with our decision in *Maas v. Goodwin*, and as sustaining the decision of the Superior Court in *Keep v. Lord*. Upon examining that case, however, it will be found that it does not affect or touch the question now under consideration. In that case an action was brought by an assignee for the benefit of creditors, to recover for goods sold by the insolvents to the defendant before their assignment; and it was held that the defendant could not set off against the debt a claim for articles ordered by the insolvents of the defendant, before their assignment, but which were not manufactured by him until several months afterwards. In this case the debt proposed to be set off had not been created when the assignment was made. The contract was then executory, and one which the defendant was under no obligation to perform after the parties to it had become insolvent. If he saw fit, after that event, to go on and execute the order, it gave him, undoubtedly, a claim against the insolvents, but none against the estate which they had previously assigned. The claim against the defendant was a subsisting liability when the assignment was made. It was for goods sold and delivered to him by the insolvents, and no right of set-off attached to it, as no liability on the part of the insolvents had then grown out of the performance of any contract on the part of the defendant.

While any thing remains to be done under an executory contract, it cannot be the subject of a set-off. It must be executed, or all that the party is required to do must be done, before it can be enforced for any purpose, whether by way of set-off or otherwise. The equitable right of set-off attaches only in cases where the respective liabilities have been fully ascertained, liquidated, and fixed. This was not the case in *Myers*

a. Davis, but it was in the present case. When the assignment was made here, each of the cross-debtors had received the consideration upon which his obligation was founded. The amounts respectively due were ascertained and the day of payment fixed, and in the order of payment the plaintiffs were entitled to receive from the insolvents the amount of the note in their hands long before they could be called upon to pay the note given by them. The reciprocal obligations having had their origin in mutual credits, and the consideration for each having been fully received, an equitable right of set-off existed, which the plaintiffs had the right to compel as soon as the note of Duclos & Co. was past due, and which could be defeated only by a transfer of the plaintiffs' note to a *bona-fide* holder.

The assignee in this case was not a *bona-fide* holder; and the error of the Superior Court, in *Keep a. Lord*, as pointed out by Judge Brady, in *Maas a. Goodwin*, consisted in applying to a general assignee for the benefit of creditors, a rule that is applicable only when an assignment is made to an insolvent purchaser for value. (*Brown a. Heathcote*, 1 *Atk.*, 162.) That the court did not consider that there was any distinction, is apparent from a case reported in the same volume (*Hicks a. McGrorty*, 2 *Duer*, 295), in which it was decided that an assignee for the benefit of creditors has, as against a set-off, all the protection that is afforded to an assignee for value. No authority is cited in the opinion of the court in support of this decision, nor is any referred to upon the argument, except the case of *Jackson a. Bloodgood* (1 *Johns. Cas.*, 51), a case that by no means warrants any such conclusion; all that the court held in that case being, that the defendant could not set off against his own debt a note of the insolvent, purchased after it was due, and after the defendant had constructive notice that the insolvent had made a general assignment to the plaintiff for the benefit of creditors; while, on the contrary, there are a number of cases in this State, the conclusion to be adduced from which is, that such an assignee is not to be regarded as a purchaser for a valuable consideration, and is in no better position in enforcing choses in action, transferred by the assignment, than the insolvent would be. (*Clason a. Morris*, 10 *Johns.*, 525; *Curtis a. Leavitt*, 15 *N. Y.*, 195; *Van Heusen a. Radcliffe*, 17 *Id.*, 580; *Griffin a. Marquardt*, *Id.*, 28; *Leger a. Bonaffe*, 2

Schieffelin *a.* Hawkins.

Barb., 475 ; Warren *a.* Fenn, 28 *Ib.*, 333 ; Marine & Fire Ins. Bank of Georgia *a.* Jauncy, 1 *Ib.*, 486 ; Matter of Howe, 1 *Paige*, 125 ; Mead *a.* Phillips, 1 *Sandf. Ch.*, 83 ; Murray *a.* Lyburn, 1 *Johns. Ch.*, 443.)

A general assignee for the benefit of creditors succeeds merely to the rights of the assignor. He is not, in respect to the property transferred, a *bona-fide* holder for value, but takes it simply as a trustee, subject to any equities which may exist between the debtor and his creditors. It is an appropriation by the debtor of his property, in trust, for the payment of his debts, in the order and manner specified ; an act by which he divests himself of it for the time being, without altogether parting with his interest in it ; for, should any property or its proceeds remain after the trust is accomplished, it returns to him.

In Van Waggenen *a.* The Patterson Gas Light Co. (3 *Zabriskie*, *N. J.*, 283), it was said that the general doctrine is, that a debtor is entitled to the same allowance by way of set-offs against the claim of an assignee for the benefit of creditors, that he would have against the insolvent himself. Assignments of this nature transfer the rights of the insolvent to the assignee, precisely in the same plight and condition as he possessed them. In Trow *a.* Ferguson (11 *Ala.*, 885), the court says : "The general assignee of a debtor in failing circumstances stands precisely in the same condition as the debtor himself ;" and in Knowles *a.* Lord (4 *Wharton*, 507), "Such an assignment does not place the assignee in any different situation in point of equity than the assignee himself ;" and in an early case (*Redoubt a. Brough*, *Cowp.*, 134) it was declared that, as respects the right of set-off, the assignee occupied the same position as the bankrupt. Assignments of this nature have been aptly termed by Chief-justice Gibson, "A bankrupt law made by the debtor for the benefit of himself" (5 *Rawle*, 321) ; and viewed in this light, the principle laid down in the English courts of equity, in assignments to commissioners in bankruptcy, is applicable—that assignees of this character, in the language of Lord Hardwicke, "though they are trustees for creditors, yet stand in the place of the bankrupt, and can take in no better manner than he could." (*Brown a. Heathcote*, 1 *Atk.*, 162.) "They are not," says Lord Eldon, in *Mitford a. Mitford* (9 *Ves.*, 100), "considered pur-

chasers for a valuable consideration. The rights of the bankrupt pass precisely in the same plight and condition in which he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take, subject to whatever equity the bankrupt was entitled to."

There was, as I have already stated, an ascertained and subsisting equity between the plaintiffs and Duclos & Co., when they made their assignment, which was not, and could not be, affected by that instrument. The defendant Hawkins, as their assignee, stands precisely in the same condition as they did; and now that their note is due and payable, the plaintiffs are entitled to have it set off against the debt owing by them.

The demurrer, therefore, is overruled.

PERSSE & BROOKS PAPER WORKS *a.* WILLET.

New York Superior Court; Special Term, March, 1862.

FOREIGN CORPORATION.—SECURITY FOR COSTS.—IRREGULARITY.

A foreign corporation may sue in the courts of this State; and though bound to give security for costs, the filing of such security is not a condition precedent of its right to sue.

Their omission to file such security at the commencement of the action is merely an irregularity.

A motion to set aside any proceeding on the ground of irregularity must be made promptly, and before the moving party takes any other step in the cause.

This action was commenced in April, 1858, by the plaintiffs, a corporation created under the laws of the State of Connecticut. After being at issue, it was noticed for trial by both parties, and in January, 1861, was tried, the jury disagreeing. The plaintiffs suspended business in February, 1861, and subsequently all their property passed into the hands of a receiver. That the plaintiffs were a foreign corporation, appears to have been known to the defendant at the time of the commencement of the suit.

A motion was now made by the defendant to set aside all the

Persse & Brooks Paper Works a. Willet.

proceedings of the plaintiffs in the action, for the reason that security for costs had not been given, as required by law.

John Sessions, for the motion.

Dudley Field, opposed.

MONELL, J.—Prior to the adoption of the Revised Statutes, it had frequently been held by the courts of this State, that a foreign corporation might sue therein. (*Silver Lake Bank a. North*, 4 *Johns. Ch.*, 370; *President, &c.*, of *Lombard Bank a. Thorp*, 6 *Cow.*, 46.) The Legislature, in the provision incorporated into the Revised Statutes (2 *Rev. Stat.*, 457, § 1), has merely enacted the common-law doctrine on this subject. It declares, that a foreign corporation, created by the laws of any other State or country, may, upon giving security for the payment of the costs of suit, prosecute in the courts of this State, &c. Independently, therefore, of the statute, a foreign corporation might sue in our courts; and the only condition imposed by the statute is, that security for costs shall be given. I cannot perceive that this is a condition precedent, or that non-compliance with it would affect the jurisdiction of the court. I am inclined to regard it as an irregularity merely, through which the plaintiff is liable to have his suit dismissed on the application of the defendant. It was so held in *Bank of Michigan a. Jessup* (19 *Wend.*, 10), and in *Onderdonk a. Ranlett* (3 *Hill*, 323). This last case arose under the statute (2 *Rev. Stat.*, 227, § 17) authorizing a justice of the peace to issue a short summons when the plaintiff is a non-resident, and tenders to the justice security, &c. The court held, that the omission to make objection to the form of the bond, operated as a waiver of the irregularity.

The omission of the plaintiffs to give security for costs at the commencement of the suit being, therefore, an irregularity merely, can it be, and has it been, waived? It is the well-settled practice of the courts of this State, that irregularities in any of the proceedings in an action must be taken advantage of, if at all, immediately after the irregularity is discovered, and the party is precluded from objecting if he takes any subsequent step in the cause. (1 *Burrills' Pr.*, 473, 4.) If the objection, therefore, is not promptly taken, it is deemed to be

Fairchild *v.* Gwynne.

waived, and the defendant is deprived of the right of afterwards objecting. There is not in theory any difference between the statute requiring foreign corporations to give security, and the statute requiring non-resident plaintiffs (natural persons) to give security. I had occasion quite recently to decide (*Fearn et al. v. Gelpeke*, 13 *Abbotts' Pr.*, 473), under the latter statute, that it was in the discretion of the court, whether a non-resident plaintiff should be required to give security; and upon a full examination of the subject, came to the conclusion that the defendant, by his laches in moving for the order, was deprived of the right of asking for it.

In this case, the defendant was apprised, at the commencement of the action, that the plaintiffs were a foreign corporation; and should have moved, without delay, to dismiss the suit. But he has laid by for four years, during which time the cause has been repeatedly noticed for trial, and once tried. The suspension and failure of the plaintiffs occurred, as alleged by the defendant, in February, 1861. It is too late, in my judgment, to move now. The defendant must be deemed to have waived the right to move, and his motion must therefore be denied, but without costs.

Reversed
16 *Abb.* 23.

FAIRCHILD *v.* GWYNNE.

Supreme Court, First District; Special Term, February, 1862.

CONSTRUCTION OF STATUTES.—AFFIRMATIVE AND NEGATIVE WORDS.

—VALIDITY OF ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.—
ACT OF 1860.

A statute which by its terms is to go into effect immediately, is operative from the instant of its final passage.

An affirmative statute does not take away the common law.

The provisions of the act of April 13, 1860 (*Laws of 1860*, 595, ch. 348),—which require general assignments for the benefit of creditors to be acknowledged by the assignor before delivery, and schedules to be made within twenty days thereafter,—are directory merely.

Trial by the Court.

Fairchild *v.* Gwynne.

This action was brought by Frederick Fairchild, as receiver of the property of Thomas Gwynne, against Thomas Gwynne, and J. A. Gwynne, assignee, to set aside a general assignment for the benefit of creditors, made by Thomas on the 2d day of May, 1860. This assignment was not acknowledged before delivery. It was proved by the subscribing witness on June 8, 1860. Plaintiff was appointed receiver October 1, 1860; and having filed his bond, commenced this action October 2, 1860, to set aside this assignment for want of the acknowledgment required by the act of 1860 (*Laws of 1860*, ch. 348), and for non-compliance with the provisions of that act.

After this action was commenced, the assignee, on the 24th of January, 1861, filed the account of the indebtedness of Thomas Gwynne and the inventory of his estate; and on that day the assignment was acknowledged and recorded. On the 25th day of January, 1861, the assignee filed his bond as assignee of the estate of Thomas Gwynne; and the defendants, in their answer in this action, alleged such subsequent compliance with the act of 1860 as sufficient. The assignment preferred Gwynne and Day for \$763: the rest of the property was to be divided among the creditors without preference.

James R. Hills, for the plaintiff.—I. The act of 1860 was, by its terms, to take effect immediately. The provisions of 1 Rev. Stat., 157, § 12, have no application whatever to this act, as the time when the act shall take effect “immediately” is prescribed in the act of 1860.

II. The receiver acquired all the title Thomas Gwynne had to the assigned property on the date of his appointment, October 1, 1860. The assignment had not been at that time acknowledged, as required by the act of April 13, 1860. The statute requires the assignment to be acknowledged before delivery. Proof of the execution does not satisfy the requirements of the statute. (12 *Abbotts' Pr.*, 36.)

III. This act applying to *all* assignments, whether of “real or personal” property, “or both,” and requiring all to be “acknowledged before the delivery thereof to the assignee,” is imperative. The language used is plain and unequivocal: it alters the law as it previously stood, so far as the statute necessarily conflicts with it (the requirement of acknowledgment,

antecedent to a valid delivery of the assignment). The rule that an affirmative statute does not take away the common law, or repeal a previous statute, is not correct. Lord Coke corrected the rule as first laid down by him, and laid it down later in life, as "a statute made in the affirmative, without any negative expressed or implied, does not take away the common law." (2 *Inst.*, 200; see, also, *Hargrave & Butler's Notes, ad loc.*) Here is an implied negative; no other mode is allowed than that of acknowledgment antecedent to delivery, and it applies to all assignments made, or to be made, after April 13, 1860. Where the common law and a later statute differ, the common law must give way to the statute (1 *Blk. Com.*, 61), for such is the manifest intent of the Legislature. The object of all maxims of interpretation is to ascertain the intent of the Legislature. The intent of the Legislature in this case is too plain to be mistaken; and the fact that all parties making assignments have complied with the requirements of section 1, Act of 1860, as to acknowledgment before delivery, shows that there has been no misunderstanding as to the intent of the Legislature, and no need of legal maxims to ascertain the intent of the Legislature.

IV. The words of the title of this act show that the provisions of the act were meant "for the benefit of creditors." The creditors are the parties who can complain of a non-compliance with provisions of the act, not the parties to the instrument. The title is never permitted to control the plain words of the statute. When the meaning is obscure, we may resort to the title to assist us to ascertain the intent of the Legislature. But it is not obscure here; it is as plain as language can make it; and such construction ought to be given as will not suffer the statute to be defeated. (15 *Johns.*, 358.) By any other construction than that contended for, the act of 1860 is a nullity, and the intent of the Legislature is wholly defeated. The cases of affirmative statutes cited by defendants are not cases of universal affirmation; and a necessary conflict does not arise by construing them as permitting the previous law and the new law to coexist. But in the case of the act in question, it is impossible to require an acknowledgment as a prerequisite to delivery, and allow the old law, which did not require it, to coexist: if the acknowledgment be unnecessary, then the act of 1860 is a nullity. The

Fairchild a. Gwynne.

law having required the acknowledgment before delivery, and no title vesting in the assignee till delivery, the property remains with the assignor till compliance with this prerequisite.

Theodore F. Jackson, for the defendant.

CLERKE, J.—I see nothing on the face of this assignment, or in the conduct of the parties, to affect its validity.

The only question, therefore, which I shall consider, is the effect of the act of April 13, 1860.

The assignment was signed, sealed, and delivered on the 2d of May, 1860. It was not acknowledged before any authorized officer previous to the delivery, but was proved before a commissioner by the subscribing witness on the 8th of June, 1860. It was, however, acknowledged by the subscribing party on the 24th of January, 1861, when the inventory and schedule were filed in the office of the clerk of the county of Kings. The assignment was recorded and the bond filed in the said office on the 25th of January, 1861.

I. By the terms of the act of 13th April, 1860, it was to take effect *immediately*. It is contended, on behalf of the defendants, that, notwithstanding the employment of this word, it did not take effect until twenty days after its date. It is insisted that, as the Revised Statutes (1 *Rev. Stat.*, 157, § 12) enact that "every law, unless a different time shall be prescribed therein, shall commence and take effect on and not before the twentieth day after the day of its final passage, as certified by the secretary of state,"—and that as this act does not prescribe a different time, it did not go into effect until twenty days after the 13th of April, 1860. The word *immediately*, it is maintained, does not prescribe a different time, but has reference to the time fixed by the general statute, *i. e.*, immediately upon the expiration of the time specified therein. This I consider a very forced construction. If the Legislature intended that it should not go into effect until twenty days after its final passage, it would either have expressly said so, or would have mentioned no time at all. But the word *immediately* means what every man, learned or unlearned, would at once understand,—that is, that the act should go into effect at the instant of its final passage.

II. This assignment, then, having been executed and deliv-

ered after this act of April 13, 1860, went into effect, and its execution and delivery not being according to the method directed by the act, is it nevertheless totally void, or are the provisions of the act to be deemed only directory?

Now, in instituting this inquiry, we are not to speculate upon the intention of the Legislature. We are to ascertain that intention by the known rules of law existing at the time of the act. It may have been the design of some or all of the members of that body, that every assignment thereafter made, in a manner not strictly in conformity with the act, should be absolutely void; but if they omitted to employ the language or the terms which the law declares to be alone indicative of that design, it is not to be regarded as within the scope of the act. Laws are to be made by the Legislature, as well as decisions by the judicial tribunals, in reference to existing rules of interpretation and guidance.

Some statutes are, from their being in affirmative terms, called affirmative; others obtain the name of negative statutes, because they are penned in negative terms. (*Bacon's Abr.*, "Statute," G.)

It is a maxim of law that an affirmative statute does not take away the common law. In the words of Lord Coke, "A statute made in the affirmative, without any negative expressed or implied, does not take away the common law." (2 *Inst.*, 200.)

Where the question was, whether an appointment of overseers, made after the expiration of the time limited by a statute (43 *Eliz.*, c. 2) for such appointment, was valid, it was holden to be so; and it was added, although that statute be introductive of a new law, no negative ought to be implied against the meaning and justice thereof. (*Rex v. Spanow*, 2 *Str.*, 1123; *Rex v. Stubbs*, 2 *Term R.*, 395, S. P.)

In *Rex v. Gravesend* (3 *B. & Ad.*, 240), Lord Tenterden recognizes the distinction, in reference to *The King v. St. Nicholas, Ipswich* (*Str.*, 1066; *Burr.*, 91). He says: "The clause which was relied upon in *The King v. St. Nicholas* for the purpose of showing the indenture to be void, is the 26th section. But this 26th section is not negative or prohibitory; it is permissive only. The 5th section of the statute (10 *Geo. II.*, c. 31) is negative and prohibitory. Section 4 prohibits a waterman from taking more than two apprentices. The contract, then,

Fairchild *a.* Gwynne.

was a prohibited contract, and this case falls within the principle of the decision of this court in *The King a. The Inhabitants of Hipswell* (8 *B. & C.*, 466). Upon the authority of that case, and upon the distinction between a prohibited contract and a provision like that of the 26th section of the statute of Elizabeth, we are of opinion that this indenture of apprenticeship was absolutely void," &c.

In *Pearse a. Morrice* (2 *Ad. & E.*, 96), TAUNTON, J., says: "The distinction between directory and imperative statutes has been long known; an early instance in which it was taken is the case of *Rex a. Spanow* (2 *Stra.*, 1123), as to the time of choosing overseers. I understand the distinction to be, that a clause is directory where the provisions contain mere matter of direction and nothing more; but not so where they are followed by such words as are used here, viz., that any thing done contrary to such provisions shall be null and void to all intents. These words give a direct, positive, and absolute prohibition, which cannot be dispensed with by the construction here contended for. In *Rex a. Gravesend* (3 *B. & Ad.*, 240), the ground upon which Lord Tenterden distinguished the case from *Rex a. St. Nicholas, Ipswich*, was, that in the latter case, the words of the section relied on were not negative or prohibitory, but permissive only; whereas in *Rex a. Gravesend* the statute (10 *Geo. II.*, c. 31, § 5) contained a direct prohibition."

In *Rex a. Justices of Leicester*, the act under consideration required that the justices shall make their sessions on certain days as therein specified, but it contained no negative or prohibitory words. Lord Tenterden says: "Looking at the earlier statutes upon the subject, we find that, by the 12 *Rich. II.*, c. 10, the justices are required to keep their sessions in every quarter of the year at least; but no particular days are specified. By the 2 *Hen. V.*, St. 1, c. 4, it was enacted that they shall make their sessions four times a year, viz., in the first week after Michaelmas, Epiphany, Easter, and the Translation of St. Thomas the Martyr, and oftener if need be. The modern statute (54 *Geo. III.*, c. 84), merely substitutes the week after the 11th of October for the week after Michaelmas; the question must, therefore, receive the same consideration as if that statute had never passed. Now, we find that so long ago as the time of Lord Hale, the earlier statutes to which I have referred were

Fairchild *a.* Gwynne.

considered as directory only." After quoting Lord Hale, he proceeds: "It has been asked, what language will make a statute imperative, if the 54 Geo. III., c. 84, be not so? Negative words would have given it that effect; but those used are in the affirmative only."

Rex a. The Inhabitants of Birmingham (8 *B. & C.*, 34), related to the Marriage Act (4 *Geo. IV.*, c. 75), the 14th section of which points out the mode in which licenses are to be obtained, and the matters to be sworn to by the parties, or one of them; and one of these matters, where either of the parties being a widower or widow shall be under the age of twenty-one years, is, that the consent of the person or persons whose consent to such marriage is required under the provisions of this act has been obtained thereto. Then the 16th section specifies the persons who shall have power to consent, and proceeds: "And such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." Lord Tenterden says: "The language of this section is merely to require consent; it does not proceed to make the marriage void, if solemnized without consent." The marriage was declared valid, and the order of the sessions was confirmed. In *Gwynne a. Burnell* (2 *Bing.*, 11, c. 39), Baron Parke observes: "It is by no means any impediment to construing a clause to be directory, that if it is so construed there is no remedy for non-compliance with the direction. Thus the statutes which direct quarter-sessions to be held at certain times in the year, are construed to be directory (*Rex a. Justices of Leicester*, 7 *B. & C.*, 6), and the sessions held at other times are not void; and yet it would be difficult to say that there would be any remedy against the justices for appointing them on other than the times prescribed by the statute. From the nature of the enactments, the courts have rightly concluded that though the Legislature intended the precise periods to be fixed, they did not intend the consequence of a deviation to be that the appointment should be void." In *Thames Haven Dock & Railway Co. a. Rose* (4 *Man. & G.*, 550), it appeared that the act of incorporation required the business of the company to be carried on by twelve directors, five of whom were to be a quorum. The directors were authorized to make calls, and in case of non-payment the company had power to sue. An

Fairchild *a. Gwynne*.

action having been brought for calls, the defendant suffered judgment by default. In Trinity Term following, he applied to set aside the judgment, upon the ground that at the time the calls were made there were only seven directors, and that he had only learned that fact after the default. The court refused the application, holding that the enactment as to the number of directors was only directory.

I am referred to other cases in which this distinction is unquestionably recognized. (*Southampton Dock Co. a. Richards*, 1 *Man. & G.*, 448; *Wood a. Chapin*, 13 *N. Y.*, 521, 526.) There is another familiar case in our own courts illustrative of this principle. The colonial act of the 8th of January, 1762,—declaring that every former division of lands of which there was a map or note in writing under the hands of the proprietors, should be a valid partition thereof, provided such map or note be proved before a judge of the Supreme Court, and a true copy of such map be filed and such note recorded,—was held not to prevent such map or deed being read in evidence to prove a partition. It was admitted, if the statute contained any negative words, as that “without such recovery, &c.,” the map should not be evidence, the act would be imperative; but as it did not contain negative words, the map was admissible in evidence, in the same manner as if the act had never been passed. (*Jackson, &c., a. Bradt*, 2 *Cai.*, 169.)

The act of the 13th of April, 1860, now under consideration, contains no prohibitory or negative words. Certain proceedings are directed, without any prohibition or penalty, or negative words expressed or implied; unless we are to take it for granted that negative words are implied from the mere fact of the passage of the statute; which, of course, would be saying that every statute implied negative words. This, I need scarcely say, would be a complete contravention of the distinction that has so long obtained, and has been so repeatedly recognized on this subject. But it has been contended that this act is introductive of a new law, and, therefore, that it did not require negative words. If it is introductive of a new law within the meaning of the principle adverted to, it is sufficient if it is only affirmative. But is it introductive of a new law? It is, indeed, a new law in the sense in which every act of the Legislature is new when it is first passed. But it is plainly absurd to suppose that it is within

the meaning of this exception because it is recently passed. It would, like the other objection to which I have adverted, be in complete contravention of the distinction between affirmative and negative statutes, which has so long obtained and has been so repeatedly recognized. It would give to all the effect of affirmative statutes.

The words "introductory of a new law," mentioned in the exception to the general rule on this subject, can apply only to enactments embracing a subject new to the law, conferring some new right or power, or affording some new remedy. An act taking away the common law, or impairing an established right, is not within the exception. It is not introductory of a new law, but of new regulations relating to an old one.

To say that a statute like this is introductory of a new law, because it introduces new regulations, would also be in contravention of the distinction between affirmative and negative statutes. The right to make an assignment in trust for the benefit of creditors, is an ancient and well-established right. The statute of 1860 does not confer or originate it. It merely directs certain things to be done in exercising this right. It provides certain modes of doing what every citizen had a right of doing before; and if it provided, in addition to prescribing these modes, that no other would be lawful, it would have the effect claimed by the counsel for the plaintiff. The true rule is, where a statute authorizes a proceeding not before allowed by law, and prescribes the mode in which it shall be done, the mode pointed out must be strictly pursued, or the proceeding will be void; but when a proceeding is permitted by the general law, either by the common law or a previous statute, and the statute directs a particular form in which it shall thereafter be conducted, it will depend upon the terms of the statute whether it is merely directory, or whether non-compliance with the mode prescribed shall render the proceeding void.

If the statute, in such case, is only affirmative, it is directory; if negative or prohibitory, it is imperative.

The act of 13th April, 1860, is, consequently, merely directory; and as no fraud has been proved before me to vitiate the assignment, the plaintiff must fail in his action.

Judgment for the defendants, without costs.

 Smith a. Smith.

rmed
 ab. 488.

SMITH a. SMITH.

Supreme Court, First District; At Chambers, April, 1862.

PRACTICE IN CASES OF CONTEMPT.—SUFFICIENCY OF SERVICE OF ORDER OF COURT.

On an application to punish for contempt, where interrogatories have been administered to the party accused, the moving party may read affidavits to contradict his answers.

In order to bring a person into contempt for disobedience of an order of the court which has been entered with the clerk, delivery of a copy of the order, showing at the same time a copy certified by the clerk, is a sufficient service.

Motion to commit for contempt.

This was an action by Jane Smith against William Smith, for a divorce. On the 9th of December, 1861, on the application of the plaintiff, an order was made, directing the defendant to pay a counsel-fee of \$250 within ten days. On the 1st of February, 1862, an attachment was issued against the defendant for contempt; and on the return-day of the attachment, an order was made directing the plaintiff to file interrogatories, and that the defendant answer them under oath. On the interrogatories and answers so filed, and on several affidavits, the plaintiff moved for a final commitment, for contempt, until the \$250 and costs were paid.

Ira D. Warren, for the motion.—I. The court may receive any affidavits, or other proofs, contradictory of the answers of the defendant, or in confirmation thereof. (3 *Rev. Stat.*, 5 ed., 852, § 19.) Where the case has been sent to a referee, or, under the old practice, to a master, to take the defendant's answers, and such other proof as either party might produce, the court would not allow *ex-parte* affidavits to be received, unless the master was specially directed by the order of reference to receive such affidavits as proof. (*Cumming v. Waggoner*, 7 *Paige*, 603; *Crary's N. Y. Practice*, 404, 407.) The order directing

Smith *a. Smith*.

interrogatories to be filed in this case, directed the application for a commitment to be heard on the interrogatories and answers, "and such further proof as either party may produce." The affidavits produced impeach the defendant. They show that he had \$169 in bank when the order was made, and for some days after. His answers to the interrogatories convict him of contempt.

II. The order directing the defendant to pay \$250 was properly served; it was a special-term order. A certified copy was shown to the defendant, and a copy at the same time delivered to him. A power of attorney to receive the money was at the same time exhibited to him, and the money demanded. This was a sufficient service of the order so as to convict the defendant of contempt. (*Hull a. Thomas*, 3 *Edw.*, 236; *People a. Sturtevant*, 9 *N. Y.*, 278.)

III. The defendant should be fined \$250, and a reasonable counsel-fee, and stand committed till paid. (*Albany City Bank a. Schermerhorn*, 9 *Paige*, 373; *People on rel. Lovett a. Rogers*, 2 *Ib.*, 103.)

William R. Stafford, opposed.

BARNARD, J.—Motion to commit defendant for contempt, in not paying the sum of \$250, directed by the order of Dec. 9, 1861. The defendant has been brought up on attachment. Interrogatories, and defendant's answers thereto, have been filed. There was an order of reference to take defendant's answers to the interrogatories, and such proof in support of, and in opposition to the answers, as each party should adduce.

The answers to the interrogatories having been filed the plaintiff moves for a commitment, and proposes to read affidavits in opposition to such answers.

Defendant opposes the motion, on the following grounds:

1. That he was not shown the signature of a judge, or of the clerk, to any order requiring him to pay.
2. That there was no personal demand.
3. That the agent who made the demand exhibited no written authority.
4. That defendant's neglect to pay arises solely from absolute poverty.

Smith *a. Smith*.

5. That no affidavit can be used in opposition to defendant's answers to interrogatories.

As to the point that affidavits contradicting answers to the interrogatories cannot be read, I think defendant is in error. Where there has been no reference to a master under the former system, or a reference under the present, to take the answers to the interrogatories, and such proofs in support of and contradictory to such answers as either party might adduce, the court, on the coming in of the answers to the interrogatories, is not only authorized, but bound to receive such affidavits as may be adduced either in support of, or in opposition to the answers. Although the court, in such case, is bound to receive affidavits, still, if the affidavits presented are such as to make it apparent to the court that an oral examination of the affidavits is necessary, an order of reference to take such examination may be required. The present case requires no such reference.

Considering, then, the affidavits read by the plaintiff in opposition to the answers to the interrogatories, as well as the answers themselves, I am clearly of opinion that a copy of the order requiring the payment of the sum of \$250 was personally served on the defendant; a certified copy, having the signature of the clerk of this court thereon, being at the same time shown defendant; and demand of payment was made on defendant personally by a person duly authorized by written authority, who exhibited his written authority at the time; and that defendant's neglect to make payment arises from a wilful disobedience of the order, and not from absolute poverty.

The order in question being a special-term order, and entered with the clerk of this court, the service of a copy of it, a certified copy of the original order under the hand of the clerk being shown at the same time, is sufficient service, under the principle of *Hull a. Thomas* (3 *Edw.*, 236; approved in *People a. Startervant*, 9 *N. Y.*, 278), to bring the party into contempt.

Motion granted.

FIELD & CHAPMAN.

Supreme Court, First District; Special Term, April, 1862.

JUDGMENT AGAINST JOINT-DEBTORS ON SERVICE OF PROCESS ON A PART.—FORM OF JUDGMENT AND EXECUTION.—CREDITOR'S ACTION.

Upon a judgment against joint-debtors in an action in which a part only have been served with summons, a creditor's action can be maintained to reach joint property of all, when an execution against their joint property and the individual property of the defendants served has been returned unsatisfied.

It seems, that a creditor's action may be commenced before the lapse of sixty days from the issuing of execution where it has been returned unsatisfied within that time.

Demurrers to the complaint in two actions.

These were two creditors' actions: the first, brought by Alfred Field and others, against Isaac L. Hunt, George M. Chapman and Julia Ann Chapman: the second, by John Askham and others, against the same defendants.

The complaints in both actions were similar, and set forth in substance that the defendants Hunt and J. A. Chapman were partners, that the plaintiffs recovered judgments in form against both of them upon partnership demands, by the personal service of summons upon Hunt alone, that executions thereupon against property were issued and returned by the sheriff of the proper county unsatisfied; that Hunt and J. A. Chapman had transferred partnership property of the value of more than \$100 to G. M. Chapman, which he still retained with the intent to hinder, delay, and defraud the plaintiff and other creditors.

Separate demurrers were interposed by the defendants J. A. and G. M. Chapman.

Chapman & Hitchcock and *William Curtis Noyes*, in support of the demurrer.—I. The complaints in these causes are founded upon judgment against Hunt alone. J. A. Chapman has had no opportunity to contest the alleged debts against her;

Field *a.* Chapman.

no remedy at law has been attempted much less exhausted. (2 *Rev. Stat.*, 173, 174, § 38; *Greenwood a. Broadhead*, 8 *Barb.*, 593; *Crippen a. Hudson*, 13 *N. Y.*, 161; *Rubens a. Joel*, *Ib.*, 488; *Andrews a. Durant*, 18 *Ib.*, 496.)

II. It has been repeatedly and expressly adjudged, that before a judgment-creditor is authorized to file a creditor's bill, he must make a *bona-fide* attempt to collect his debt against all the defendants before he can apply to the court of equity for relief. (*Child a. Brace*, 4 *Paige*, 309; *Howard a. Sheldon*, 11 *Ib.*, 558; *Kirby a. Schoonmaker*, 3 *Barb. Ch.*, 46; *Hendricks a. Robinson*, 2 *Johns. Ch.*, 283; *Wiggins a. Armstrong*, *Ib.*, 144; *Brinkerhoff a. Brown*, 4 *Ib.*, 671.) The same rule has been held and adopted by the courts under the Code.

III. The plaintiffs in this action are not judgment-creditors of J. A. Chapman. She has never been served with any process. The judgments set out in the complaint cannot even be read in evidence against her. (*Oakley a. Aspinwall*, 4 *N. Y.*, 513; 1 *Duer*, 1; 13 *N. Y.*, 500.) In analogous cases, as where a stockholder is sued for a debt of the corporation, or a surety for the debt of his principal, the judgment is no evidence against him who is not a party to it. (*Moss a. McCullough*, 5 *Hill*, 131; *Bonaffe a. Fowler*, 7 *Paige*, 576; *Thomas a. Hubbell*, 15 *N. Y.*, 405.)

George N. Titus, opposed.—I. This is not an action in the nature of a mere creditor's bill under 2 *Rev. Stat.*, 173, § 38. It is an action by execution-creditors of the firm of I. L. Hunt & Co., having acquired a lien upon its personal property and choses in action, to set aside a fraudulent transfer, and to marshal the assets of the firm among the partnership creditors. I will consider this case,—1. As a creditor's bill upon execution returned *nulla bona*. 2. As a bill by a partnership creditor to marshal the assets of a firm among the *partnership creditors*. In either aspect, the complainants are entitled to relief against both the defendants Chapman.

II. *Equity* will lend its aid to *enforce a judgment* at law for the payment of money, whenever the *legal* remedy provided for its collection has been exhausted; to wit, an execution issued and returned unsatisfied. 1. This principle of equity existed before the Revised Statutes, and independent of any statute.

In *Hendricks v. Robinson* (2 *Johns. Ch.*, 296), the ground for the interference of equity was the incompetency of the common-law court to enforce its own judgment. The purpose of the interference of equity was to assist the execution of the judgment—to compel an application of that property of the debtor to the satisfaction of *the judgment*, which, but for some fraudulent acts, might have been taken upon the execution. 2. The foundation of the claim of an execution creditor to the aid of the Court of Chancery to enforce his judgments, was the return of a *fi. fa.* unsatisfied. (*Hendricks v. Robinson*, 2 *Johns. Ch.*, 296; *Brinkerhoff v. Brown*, 4 *Ib.*, 677; *Hadden v. Spader*, 20 *Johns.*, 559, 568; *Spader v. Davis*, 5 *Johns. Ch.*, 280; *S. C.*, on appeal, 20 *Johns.*, 554; *Balch v. Wastall*, 1 *P. Wms.*, 445.) It is apparent from these cases that the power of the courts of of chancery was exercised “to assist the execution of a judgment at law,” and that the return of an execution *nulla bona*, was proof that the legal remedy for its collection had been exhausted. 3. Chancery, in aiding the execution of the judgment, followed the law: *æquitas sequitur legem* was its maxim. It enforced the judgment as the common-law courts might have enforced it, if no fraudulent obstruction had been placed in the way of its execution, and in some cases enforced satisfaction in a manner unknown at law. (*Story Eq. Jur.*, §§ 64, 1216 a, 1216 b.) It reached the property which the execution might have taken if it had remained with the defendants. It went beyond the reach of the execution,—laid hold upon choses in action, &c., of the defendants, and applied them to the satisfaction of the judgment. Its powers were exercised in aid of the execution and to effectuate the judgment. 4. This principle of equity, as thus adjudicated, was incorporated into the statute law of this State in 1828. (3 *Rev. Stat.*, 669, original notes of revisors; 2 *Ib.*, 173, §§ 38, 39; *Child v. Brace*, 4 *Paige*, 309.) Chancery would assist the execution of a judgment at law. 5. This principle has been preserved in full force under the present judicial system of this State. This old equitable remedy of an execution creditor by bill in chancery is now enforced by action in this court. (*Hammond v. Hudson River Iron Co.*, 20 *Barb.*, 378.)

III. It is admitted by these demurrers, that these plaintiffs are judgment-creditors of Isaac L. Hunt and Julia Ann Chap-

Field *a.* Chapman.

man,—that executions against their property were issued to the sheriff of New York and returned unsatisfied after the lapse of sixty days. The plaintiffs pursued their *legal* remedy for the collection of their judgments to every available extent, before the commencement of this action. These executions were issued against the property of these defendants Hunt and Julia Ann Chapman, on judgments at law, which had been regularly recovered *against both of them*. 1. These judgments were regularly recovered against Hunt and J. A. Chapman after service of summons upon her partner, and the executions thereon were issued against her property. These judgments *against her* are expressly authorized *by statute*. (*Act of 1813*, in note, 1 *Johns.*, 62; 2 *Rev. Stat.*, 377, § 1; *Sess. Laws of 1833*, ch. 271, § 3.) Such a judgment created a lien upon the joint property of both defendants. (*Pardee a. Haynes*, 10 *Wend.*, 630; *Lahey a. Kingon*, 13 *Abbotts' Pr.*, 192.) Code, § 136, continues that practice, and authorizes expressly that the judgment may in such case be enforced against the *joint property of both, &c.* They have all the force and effect of record evidence against *both defendants*, so far as to *bind their joint property*. (See *Ballou a. Hurlbert*, 1 *Johns.*, 61; *Dando a. Doll*, 2 *Ib.*, 87; *Bank of Columbia a. Newcomb*, 6 *Ib.*, 97; *Oakley a. Aspinwall*, 2 *Sandf.*, 8.) They have the same effect against the joint property of both defendants as they have against the separate property of the defendant served with the summons. (*Code*, § 136.) 2. These plaintiffs, upon a return of their executions unsatisfied, had a *statutory right* to the aid of this court by this action to enforce their judgments against the joint property of their partners. (*Hammond a. Hudson River Iron Company*, 20 *Barb.*, 378.) The statute, 2 *Rev. Stat.*, 173, § 38, is, that *whenever* an execution against the *property* of a defendant, &c. This remedy was not restricted to a specific class of judgments, but embraced every judgment authorized by law. Such a judgment, as clearly as any other, is within the spirit and policy of 2 *Rev. Stat.*, 173, § 38. That statute excepts no judgments from the remedy it has provided. Chancery sustained creditors' bills founded upon judgments at law and executions returned unsatisfied against joint-debtors, where one of them was not served with process in the suit at law. The debtor not served with process was a necessary party to the bill in chancery, and the bill was de-

murrable, if he were omitted, for want of parties. (Van Cleef *a. Sickles*, 5 *Paige*, 505; Commercial Bank of Lake Erie *a. Meach*, 7 *Ib.*, 449.) Chancery had undoubted jurisdiction in such cases over joint-debtors and their joint property, under 2 Rev. Stat., 173, § 38, where but one was served with process in the suit at law. The statute does not state in terms, nor by implication, that such judgments may be enforced *only by execution*:—the language of the Code is, that the judgment may be “*enforced against the joint property of all*,” without stating *how* it shall be enforced. Although the statute relating to proceedings against joint-debtors (2 *Rev. Stat.*, 377, 3 ed.), declared “the mode and manner of executing such judgment by *legal process*,”—the power of chancery to aid such legal process is not to be sought for in that statute, as it was given by 2 Rev. Stat., 173, § 38. *Oakley a. Aspinwall* (4 *N. Y.*, 513), was wholly unlike the present action.

IV. These plaintiffs had exhausted their “legal remedy” for the collection of their judgments before the commencement of this action; they had made a *bona-fide* attempt to collect them by execution to the sheriff of the county of New York, and failed. 1. The “legal remedy” which chancery required should be exhausted, is simply an execution against the defendant’s property. It did not mean the judgment, but the execution to enforce it. (2 *Johns. Ch.*, 296, and cases above cited.) Chancery required the creditor only to exhaust his legal remedy to collect such judgment as he had, and when that was done, lent its aid to the execution. 2. The return of *nulla bona* to these executions, is proof that the plaintiffs have made a *bona-fide* attempt to collect their debts by execution at law. That is sufficient to entitle them to the aid of this court to enforce their judgments, unless the defendants aver by answer and establish by proof that they, or one of them, had visible property, known to these plaintiffs, within reach of these executions. (*Child a. Brace*, 4 *Paige*, 309; *Howard a. Shelton*, 11 *Ib.*, 558.) The defendants, in those cases, answered and proved that the legal remedy had not been exhausted. In the present case, in addition to the return of *nulla bona*, the demurrers admit that all the firm property, except choses in action, were fraudulently transferred by Julia to George. 3. If no application to defend is made, the presumption is that the firm owed the debts, and

Field *a.* Chapman.

the judgment should be enforced. No such application has been made in this case, and the justice of the debts stands confessed. By her fraudulent transfer, J. A. Chapman has prevented their collection by execution, and rendered this action necessary. Any rule which would require judgment and execution against her separate property, before this equitable relief can be asked, would be in aid of a fraudulent debtor, rather than of an honest creditor. The legal remedy in the Field case was exhausted, although the executions were returned before the expiration of 60 days. (*Morange a. Edwards*, 1 *E. D. Smith*, 414; *Engle a. Boneau*, 2 *Sandf.*, 679; *Messinger a. Fisk*, 1 *Code R.*, 107.) The executions in the Askham case were returned after the expiration of 60 days.

V. The demurrers admit that the defendants Chapman have in their possession notes and accounts receivable of the firm to the amount of about \$30,000, which they are collecting, and refuse to apply towards the firm debts. The case stated in the complaint, entitles the plaintiffs to relief in respect to these choses in action.

VI. This action is not in the nature of a mere creditor's bill under 2 Rev. Stat., 173, § 38. 1. All the visible property of this insolvent firm was transferred by one partner to her brother, on account of her individual debt to him, in violation of the copartnership agreement, and in fraud of the rights of the partnership creditors. That transfer was fraudulent and void as against them, as well as the partner Hunt. (*Wilson a. Robertson*, 21 *N. Y.*, 587; *Jackson a. Cornell*, 1 *Sandf. Ch.*, 348; *Greenwood a. Broadhead*, 8 *Barb.*, 593; *Murrill a. Medsons*, 8 *How. U. S.*, 414; *Yale a. Yale*, 13 *Conn.*, 185; *Topliff a. Vail*, *Harr. Ch.*, 340.) The defendants, by their demurrers, admit their fraudulent intent in this transfer—that the firm was thereby reduced to insolvency. 2. The plaintiffs were creditors of this firm before that transfer was made, and are entitled to have it vacated. (*Cooke a. Smith*, 3 *Sandf. Ch.*, 334.) They have acquired an equitable lien upon the property thus fraudulently transferred, and the remaining assets of the firm and the right to have the same applied to the payment of the firm assets. They have reduced their debts to judgment against the partners and issued executions thereon, which created a lien upon the personal property of the firm. (*Greenwood a. Broad-*

Field *a.* Chapman.

head, 8 *Barb.*, 593.) The fraudulent acts of these defendants obstructed the execution and compelled the plaintiffs to seek relief in equity. They had acquired a lien or were in a situation to enforce one, which they seek to do by this action. 3. This lien of partnership creditors will be enforced in equity at the suit of the judgment and execution creditors of the firm. Relief in cases of this nature is administered in equity on behalf of all the partnership creditors. (*Kirby a. Schoonmaker*, 3 *Barb. Ch.*, 46; *Wilson a. Robertson*, 21 *N. Y.*, 587.) 4. This firm property may be reached in the possession of George M. Chapman, and applied to the payment of the firm debts. (2 *Story Eq. Jur.*, § 1253; *Cooke a. Smith*, 3 *Sandf. Ch.*, 334.) Chapman is not a *bona-fide* purchaser, but has acquired possession of the property of this firm by fraud.

BALCOM, J.—I do not think a long opinion, in any case, certain evidence that the author very carefully examined the questions discussed, or that the conclusions arrived at are sound, and shall therefore write a short one in these cases.

Each complaint in these actions shows that the defendants Hunt and Julia Ann Chapman were partners; that the plaintiffs recovered judgments, in form, against both of them, upon partnership demands, by the personal service of the summons only upon Hunt; that executions thereon, against property, were issued, and returned by the sheriff of the proper county unsatisfied; and that Hunt and Julia Ann Chapman transferred partnership property of the value of more than \$100 to the defendant George M. Chapman, which he still retains, with the intent to hinder, delay, and defraud the plaintiffs and other creditors.

The executions authorized the sheriff to seize and sell any goods that belonged to Hunt alone, or to him and Julia Ann Chapman as partners, but none that were the separate property of the latter.

It is provided by subd. 1 of section 136 of the Code, that, if the action be against defendants jointly indebted upon contract, the plaintiff, when the summons has not been served on all the defendants, may proceed against those served, unless the court otherwise direct; and if he recover judgment, "it may be entered against all the defendants thus jointly indebted, so far only

Field a. Chapman.

as that it may be enforced against the joint property of all, and the separate property of the defendants served." The Revised Statutes contain provisions quite similar. (See 2 *Rev. Stat.*, 377, §§ 1 to 4, inclusive.)

The statutes authorizing judgment-creditors to maintain equitable actions, after they have failed to collect their judgments by execution, contain the following provisions, namely: "Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him." (2 *Rev. Stat.*, 173, § 38.) The court shall have power, among other things, to decree satisfaction of the sum remaining due on such judgment, out of any property, money, or things in action belonging to the defendants, whether the same were originally liable to be taken in execution at law or not. (*Ib.*, § 39.)

The plaintiffs' judgments established their right to collect the moneys therein mentioned out of the joint property of Hunt and Julia Ann Chapman (*Code of Pro.*, § 136; 2 *Rev. Stat.*, 377, § 4); and I am unable to perceive any good reason why the plaintiffs are not entitled to have such judgments satisfied out of the partnership property that those defendants fraudulently transferred to George M. Chapman. (See 2 *Rev. Stat.*, 137, § 1.) The executions issued on such judgments were as efficacious against the joint property of those defendants as they would have been if the judgments had bound the latter personally. The plaintiffs have not only exhausted their remedy by execution upon such judgments, but also all remedy they could have, by that process, against the partnership property of Hunt and Julia Ann Chapman, upon any judgment they could obtain against them in any legal action.

The statute only requires that "an execution against the property of a defendant" be returned unsatisfied, in whole or in part, to entitle the plaintiff to maintain an equitable action, to reach choses in action belonging to the defendant, or any property held in trust for him, or fraudulently transferred by him to a third person.

Field v. Chapman.

It seems to me to be not only just but clear, that whenever the remedy by execution for enforcing a judgment is duly exhausted, the plaintiff may maintain an equitable action to recover any property, money, or things in action, *that ought to be applied to the satisfaction of the judgment.*

I would ask why the plaintiffs in these cases should be compelled to go back and recover judgments that would bind Julia Ann Chapman personally, before being allowed to invoke the equitable powers of the court to obtain the joint property that she and her partner owned and fraudulently transferred to George M. Chapman? The judgments they now have show their legal right to seize and sell on execution any goods that Hunt and Julia Ann Chapman have as partners. And I am unable to see that the legal right of the plaintiffs to have their judgments satisfied by execution out of partnership property, has been greater at any time than their equitable right now is to have them satisfied out of like property. I cannot construe the statute authorizing judgment-creditors to maintain suits in equity after the return of executions unsatisfied, so as to deprive the plaintiffs of this equitable remedy. I think it would be unjust to do so; and that neither the language of the statute, nor any adjudged case prior to the decision of Mr. Justice Allen in these, requires such a construction.

I think Mr. Justice Allen came to a wrong conclusion, when these cases were before him, upon the motions for the appointment of a receiver (13 *Abbotts' Pr.*, 320), and that he erred, almost in the beginning of his opinion, in saying: "No judgment at law has been recovered against Julia Ann Chapman, and no execution has been issued against her upon any such judgment." For the judgments are against her as a partner of Hunt, and executions against her, as such partner, were issued upon the judgments, and returned unsatisfied. Besides, his opinion does not show that he considered the fact, that one material object of the actions is to reach property that Julia Ann Chapman and Hunt had owned as partners and fraudulently transferred; and the cases are now stripped of the affidavits which formed a part of them when they were before him.

I regret that my views and Mr. Justice Allen's are in conflict, especially because of his great ability and learning. But I cannot concur in his opinion; and as it is not controlling, I shall

McGay *a.* Keilback.

act up to my own convictions of right in the cases, and the general term must determine which of us is wrong. I hardly need to say I concur in his views so far as they show that the separate property of Julia Ann Chapman, in which Hunt never had any interest as her partner, cannot be reached in these actions. But I do not agree to his dictum, that actions like these cannot be brought unless the executions issued on the judgments, remain sixty days in the hands of the sheriff before he returns them unsatisfied. I have repeatedly held the contrary, and so has the general term in the sixth district, and some, if not all, of the justices of this court in the first district.

My conclusion is, that each complaint in these actions states facts sufficient to constitute an equitable cause of action against the defendants, and that, consequently, the demurrers to the complaints should be overruled with costs; but with leave to the defendants to answer on payment of the costs occasioned by the demurrers.

McGAY *a.* KEILBACK.

New York Superior Court; Special Term, May, 1861.

SUBROGATION.—JUDGMENT-CREDITOR'S ACTION.

A person damnified by the acts of a wrongdoer has no right to be subrogated to an indemnity which the wrongdoer may have taken against liability arising from his wrongful act.

In a creditor's action against a judgment-debtor and his debtor, to reach securities held by the former, the plaintiff is in no better position than an assignee of the judgment-debtor.

A judgment-creditor cannot impeach a release by the debtor, of a mere contingent obligation.

Trial by the court.

This action was brought by James McGay against Franz Keilback and Robert Reid. Reid was one of the constables of the city of New York, and, under an execution issued out of one of the district courts of that city against the property of one

McGay *a.* Keilback.

Linsheimer, seized certain personal property. The present plaintiff claimed the property, and Reid obtained from Keilback the ordinary indemnity bond and retained possession of the property. The present plaintiff commenced an action against Reid, to recover possession of the property, and procured its delivery to him, as a provisional remedy, under the Code, and finally obtained judgment for the possession, and for \$123.78 costs, on the 11th day of February, 1859, and issued execution for his costs, which was returned unsatisfied.

The complaint, in addition to these facts, set forth that Reid was insolvent since the 6th day of October, 1859; that about that time the plaintiff notified Keilback of the recovery of judgment against Reid, that he claimed the bond of indemnity, and that Keilback must pay the judgment against Reid. It also averred Keilback had failed to keep and save Reid harmless, as in the bond of indemnity covenanted, by omitting to pay the judgment against him. The complaint also averred that on the 18th of December, 1860, the defendant Keilback, combining and confederating, &c., had procured from Reid, for a trifling consideration, a release from the indemnity bond, which release was claimed to be invalid against the plaintiff.

The relief demanded was, that the plaintiff be subrogated to the rights of Reid upon the bond, as they existed prior to the release to the extent of his judgment against Reid; or that the release, be set aside as fraudulent, and that plaintiff be declared entitled to be paid the amount due to him on his judgment against Reid; and that a receiver of the indemnity bond collect the amount due, and pay plaintiff's judgment.

The answer of Keilback denied, among other things, all the allegations of collusion with Reid; and for a second defence, averred that the release was executed for a valuable consideration, and presented the same as a bar to the action. The case came on for trial on the pleadings and proofs.

Nelson Smith, for the plaintiff.

Joseph E. Berry, for the defendant Keilback.

ROBERTSON, J.—The plaintiff claims that he is entitled to make the defendant pay him the amount recovered by him in the judgment against Reid, the officer, upon two grounds :

First, That he is entitled to be subrogated to all the rights and remedies of Reid, under or upon the bond of indemnity of the defendant to him; and,

Secondly, That as a judgment-creditor of Reid, he is entitled to a judgment for the payment to him of the amount due to the latter.

The bond in question is strictly one of indemnity merely, against general damages only, by the doing by the obligee of the acts complained of; it is not one of indemnity against the costs and damages in any particular action, as in the case of *Chase a. Hinman* (8 *Wend.*, 452); nor does it provide absolutely for the performance of a specific act, or payment of any sum of money to third persons or the obligee, as in the cases of *Gilbert a. Wyman* (1 *N. Y.*, 550); *Thomas a. Allen* (1 *Hill*, 145); *Churchill a. Hunt* (3 *Den.*, 321). No notice of the suit against the indemnitee was given to the indemnitor, nor was the legality of the recovery of the judgment against the former established in this cause; the counsel who defended in such action was not retained to do so by the defendant in this, so that he was not in any way bound by the result therein.

There was no privity of contract between the plaintiff in this action and the defendant growing out of the bond in question, as there was none between the obligee and the plaintiff. The acts of the former, against the consequences of which he was to be indemnified, were to be hostile to the latter if they affected him at all; the relations of principal debtor to the plaintiff and surety could not arise between the obligor and obligee, so as to give the plaintiff any right of subrogation. Even if the right of waiver by the plaintiff of the trespass, and his election to sue the obligor for goods sold and delivered, could convert the bond in question into an obligation to guaranty the reimbursement of the price, no such election has been made, and the only recovery had was for costs in an action of claim and delivery of personal property.

The validity of the bond itself depended upon the ignorance of the obligee, that the acts for which he was to be indemnified would be trespasses; if he had known them to be so, he would have been a joint wrongdoer, and the contract would have been illegal. (*Allaire a. Ouland*, 2 *Johns. Ch.*, 54; *Coventry a. Barton*, 17 *Johns.*, 142; *Stone a. Hooker*, 9 *Cow.*, 154.) The instru-

ment, therefore, must be assumed to have been executed mainly to protect the obligee against the expenses of defending against unfounded claims; any damages arising from well-founded claims could only come in incidentally, as the accidental result of a well-intended effort to seize only property which really belonged to the judgment-debtor, otherwise it would be palpably an agreement to indemnify for committing torts. It would be an extraordinary result, therefore, from the application of any other principles of law, which should make an obligor in a bond of indemnity against the liability of the obligee for levying on property under an execution, liable directly to the party whose goods had been levied on; and that, too, not as a co-trespasser whose complicity was established by the bond (*Herring v. Hopcock*, 15 *N. Y.*, 409), but on a contract as having actually agreed with his fellow-wrongdoer, if he would commit the wrong, to pay the plaintiff his damages. If there ever existed any liability, equity, or privity of contract between the plaintiff and defendant, it must have arisen at the time of executing the bond, or, at least, when the acts were performed whose results were indemnified against; yet, can it be said that the obligee could not immediately have rescinded, cancelled, or discharged the bond without the plaintiff's assent?

If the views urged on behalf of the plaintiff be correct, he ought not to have been obliged to wait for a recovery against the obligee; he should have been entitled to compel an assignment of the bond to himself, the moment those acts were performed, against the liability of the obligee for which, he was indemnified by the bond. If the abhorrence of the law for unnecessary litigation entitled the plaintiff, at the beginning of this action, to an assignment of the bond and a recovery directly against the defendant in order to obviate the necessity of two actions, it did so when the levy was made; the damage was then done, the officer then became liable, and, upon a proper recovery by the plaintiff against him, and his satisfaction of such recovery, the defendant would have become liable to him. But therein consists the difference of the two liabilities,—the obligee was liable when he committed the tort; the defendant was not liable, until a proper recovery against and payment by the obligee; a mere liability by him was not enough. Such an action upon such a bond, by a person standing in the plaintiff's

position upon such a bond, is equally without precedent, with an action to compel the assignment of such a bond simply on the ground of the double and corresponding liability of the officer and his indemnitor. No authority has been furnished to warrant them, and no principle sustains them.

Even laying out of view the objection that the plaintiff seeks to procure an assignment of the bond, and recover for its breach in one action, without the intermediate step of appointing a receiver as an assignee by whom a suit might be brought upon the bond (*Edmonston a. McCloud*, 19 *Barb.*, 357), the action must fail as an equitable garnishee process against a debtor of a judgment-debtor. There is no evidence that the obligee ever acquired any right of action on the bond by paying any amount for which he was legally liable. (*Gilbert a. Winan*, 1 *N. Y.*, 550; *Campbell a. Jones*, 4 *Wend.*, 306; *Scott a. Tyler*, 14 *Barb.*, 202.) Nor is there even any evidence as against this defendant, that Reid was ever made legally liable for any damages. (*Aberdeen a. Blackman*, 6 *Hill*, 324; *Crippin a. Thompson*, 6 *Barb.*, 532; *Stone a. Hooker*, *supra*.) There was no proof of notice to the defendant to defend the action against Reid, or that he volunteered to defend it; and there was no proof to establish originally that Reid was liable in the action in which costs were recovered against him; the plaintiff, therefore, could not recover as Reid's assignee, and he is in no better position than any other assignee. The action cannot, therefore, be sustained as a proceeding by a judgment-creditor.

What has been said sufficiently disposes of this case, without reference to the question of the release by Reid to the defendant. If the defendant had actually become liable to Reid, and the latter executed the release with an intent on the part of both to defraud the plaintiff of his rights as judgment-creditor, to be acquired under a threatened supplementary proceeding or action on his part to reach such liability, the release would be void; but as his liability was still *in fieri*, and it was still a mere contingent obligation, Reid had a perfect right to rescind, cancel, or discharge it; a legal recovery against him with the privity of the defendant, or upon a legal necessity which could be established by the plaintiff, was essential to charge the defendant with a present debt: the recovery being indispensable, because the costs or damages were uncertain until liquidated

Carter *a.* Koezley.

thereby. The release, therefore, was operative and valid, and discharged the defendant from any contingent liability; in law, it took the seal off the bond as if it had never existed. The notice, too, from the plaintiff, as to the time of whose delivery the evidence was contradictory, seems to have proceeded rather on the theory of an immediate liability of the defendant to the plaintiff, than on that of an equitable assignment in contemplation of law transferring to the plaintiff the liability of the defendant. The release, therefore, does not seem to have been executed contrary to any warning contained in such notice. Other testimony apparently establishes only an intent to relieve himself from future liability; this, of course, would not make it effectual, if the plaintiff was entitled to be subrogated to the rights of the obligee, which would make him already equitable assignee in law, and the defendant knew the facts which gave such right of subrogation. Whether there was sufficient evidence of an intent to defraud the plaintiff as a creditor of the obligee by such release, therefore, it is not necessary to decide in this case.

The complaint must therefore be dismissed, with costs to the defendant.

CARTER *a.* KOEZLEY.

New York Superior Court; General Term, December, 1861.

PLEADING.—SUFFICIENCY OF ANSWER.—DETERMINATION OF OFFICER OF SPECIAL JURISDICTION.

It is essential to the sufficiency of an answer stating new matter as a defence, that it state facts which, if true, will bar the action or so much of it as is attempted to be answered.

Under section 161 of the Code, it is necessary in pleading the determination of an officer of special jurisdiction, to designate the officer,—an averment that such determination was duly made, is insufficient.

In an action to recover possession of real property, the answer averred that at the commencement of the action defendant was in possession, as assignee, of a lease of a specified date for an unexpired term, by the Mayor, &c., of New York, in pursuance of a sale of the premises, by them duly made, on a day named, for the non-payment of a tax duly imposed thereon;—*Held*, insufficient.

Appeal from an order overruling a demurrer to part of an answer.

This action was brought by George Carter against Frederick Koezley, to recover possession of a lot of land in 83d street, in the city of New York, with damages for withholding.

The answer set up, besides a general denial, the following defences :

Second. For a further and separate answer defendant alleges that on or about the 26th of April, 1853, two certain lots, known as numbers 14 and 15 on the Ward Map of the city of New York, for the 19th Ward, situate between 2d and 3d Avenues, and 83d and 84th streets, New York, were duly sold, in pursuance of the statute in such case made and provided, by the mayor, aldermen, and commonalty of the city of New York, to one Arthur Ross, for the term of twenty years, for the non-payment of a tax duly imposed thereon, in pursuance of the statute in such case made and provided; and that the said mayor, aldermen, and commonalty did thereupon, in pursuance of the statute in such case made and provided, and on or about the 27th of April, 1855, duly execute, acknowledge, and deliver to said Arthur Ross in writing, in due form of law, a lease of said lots numbers 14 and 15, for the term of twenty years then next ensuing; that afterwards, and on or about the 20th of January, 1859, said Arthur Ross, by an instrument in writing under his hand and seal, duly sold, conveyed, and transferred to this defendant the above-mentioned lease, and all his right, title, and interest in and to the same; and that at the time of the commencement of this action this defendant had and now has a leasehold interest in and to, and a right to the possession of said lot known as No. 15, under and by virtue of said lease, and said assignment, which said lot is the lot described in the complaint.

Third. This defendant for a further answer states and shows, that on or about the 14th of June, 1852, a certain lot known as No. 15 on the Ward Map of the city of New York, for the 19th Ward, situate between 2d and 3d Avenues, and 83d and 84th streets, was, among other property, duly sold by the mayor, aldermen, and commonalty of the city of New York, in pursuance of the statute in such case made and provided, to one Arthur Ross, for an unpaid tax duly imposed thereon, in

Carter a. Koezley.

pursuance of the statute in such case made and provided; and that thereupon, and on or about the 18th of June, 1854, said mayor, aldermen, and commonalty duly executed, acknowledged, and delivered, in pursuance of the statute in such case made and provided, a lease of the same in writing, in due form of law, to said Arthur Ross, for the term of one hundred years then next ensuing, which lease was duly recorded in the office of the register of the city and county of New York, May 22d, 1858, in Liber 761 of Conveyances, p. 125; and that thereupon, upon the execution of said lease last above mentioned, said Arthur Ross duly went into the possession of said lot No. 15; that afterwards, and on or about the 22d of April, 1856, said Arthur Ross having a leasehold interest in and to said lot No. 15 for a term of 98 years or thereabouts then next ensuing, and being in possession thereof, duly executed, acknowledged, and delivered, to one William M. Baldwin, a lease in writing, in due form of law, of said lot No. 15, for and during the term of 15 years then next ensuing, which last-mentioned lease was duly recorded in the office of the register of the city and county of New York, in Liber 765 of Conveyances, p. 637, January 21, 1859; and that thereupon said Baldwin, upon the execution of said lease, duly entered into possession of said lot No. 15. That afterwards, and on the 19th of January, 1859, said Baldwin, by an instrument in writing under his hand and seal, duly executed, acknowledged, and delivered to this defendant an assignment of said lease last above mentioned, which assignment was duly recorded in the office of the register of the city and county of New York, January 21, 1859, in Liber 765 of Conveyances, p. 626; that on or about the 19th of January, 1859, said Arthur Ross, by an instrument in writing under his hand and seal duly executed, acknowledged, and delivered to this defendant an assignment of all his right, title, and interest in and to the above-mentioned lease from the said mayor, aldermen, and commonalty to said Ross, bearing date on or about June 19, 1854, of and to said lot No. 15, which assignment was duly recorded in the office of the register of the city and county of New York, January 21, 1859, in Liber 765 of Conveyances, p. 625. That by reason of the matters above set forth, this defendant had at the time of the commencement of this action, and now has, a leasehold interest in and to said lot No. 15, and

Carter *a. Koezley*.

a right to the possession thereof, which lot embraces a portion of the premises mentioned in the complaint.

To the second and third defences the plaintiff demurred for insufficiency. The demurrer was overruled at special term, whereupon plaintiff took the present appeal.

John Townshend, for the appellant.

Townsend & Levinger, for the respondent.

BY THE COURT.*—BOSWORTH, C. J.—Neither of the defences demurred to states when, by whom, for what cause, or under what statute, the alleged tax was “imposed” on the premises in question: neither does it state the amount of the tax imposed, nor expressly aver that any part of it was unpaid at the time of the alleged sale of the said premises.

That such a plea was bad on general demurrer prior to the Code, is settled by the cases of *Frary a. Dakin* (7 *Johns.*, 75), *Morgan a. Dyer* (10 *Ib.*, 161), *Wyman a. Mitchell* (1 *Cow.*, 316), *Dakin a. Hudson* (6 *Ib.*, 220), *Bowman a. Russ* (*Ib.*, 234), *Sheldon a. Hopkin* (7 *Wend.*, 435), and *City of Buffalo a. Holloway* (7 *N. Y.*, 493).

It is as essential to the sufficiency of an answer under the Code stating new matter as a defence, as to that of a special plea prior to the Code, that it state facts which, if true, will bar the action, or so much of it as is attempted to be answered.

The Code has not introduced any new definition of the word *fact*, nor any new test of the sufficiency of new matter which will constitute a defence.

Section 161 of the Code does not aid the answers in question. They do not allege, nor purport to allege, a judgment or other determination of a designated court or officer of special jurisdiction. If the imposition of a tax upon real property under any statute of this State, for any cause, can, by any liberal interpretation of language, be regarded as a determination of officer or officers of special jurisdiction within the meaning of this section, the answer does not attempt to state by whom the tax was imposed.

* Present, BOSWORTH, C. J., WOODRUFF, HOFFMAN, ROBERTSON, MONCRIEF, and WHITE, JJ.

The People *on rel.* Hanrahan *a.* The Board of Police.

The parts of the answer demurred to are, in brief, that the defendant has a right to the possession of the premises in question as assignee of a lease of a specified date for a term of years, executed by the mayor, &c., in pursuance of a sale, by them duly made on a day named, of the premises in question, for the non-payment of a tax duly imposed thereon.

Such an answer is insufficient: it states none of the facts relied upon to show that a tax was duly imposed on the property, for the non-payment of which the mayor, &c., of N. Y., might lawfully sell it; nor, if one had been imposed, does it aver the further facts essential to create authority in that body to advertise and sell.

The order appealed from must be reversed, and judgment ordered for the plaintiff, but with liberty to the defendant to amend his answer, on payment of the costs of the demurrers prior to the appeal: the plaintiff's costs of the appeal to abide the event.

THE PEOPLE *on rel.* HANRAHAN *a.* THE BOARD OF
POLICE.

Supreme Court, First District; General Term, January, 1862.

MANDAMUS.—GENERAL AND SPECIAL VERDICT.—RES JUDICATA.

Where several issues arising on the return to a writ of alternative mandamus are submitted to a jury, a general verdict may properly be directed.

Where several special issues are submitted to a jury, who, under instructions of the court, render a general verdict, such verdict is equivalent to finding each of the issues in favor of the party in whose behalf the general verdict is found.

Where the court, on motion to quash the return to a writ of alternative mandamus, has sustained the return, it may issue a peremptory writ, although the issues raised by the return are found in favor of the defendant.

Motion for a peremptory mandamus.

The relator, Richard Hanrahan, procured, in May, 1859, an alternative mandamus against the defendants, The Board of Police of the Metropolitan Police District of the State of New York. Hanrahan had been a member of the Municipal police of the city of New York. The alternative writ alleged, in sub-

The People on rel. Hanrahan v. The Board of Police.

stance, that whereas the relator was, at the time of passing the Metropolitan Police Act, April 15, 1857, a patrolman, and one of the police of the city of New York, duly appointed and sworn, and had never been legally discharged or dismissed; and whereas he became, by virtue of that act, a patrolman and member of the police force of the Metropolitan Police District, and held office and did duty under that act, and had the requisite qualifications, yet the Board of Police had unjustly, and without jurisdiction, removed him and deprived him of the emoluments of the office, and had refused to recognize him as such patrolman, or to permit him to exercise the powers and duties of the office.

The writ then required the Board to restore him to the office, and permit him to exercise the same, and take the profits and salary thereof, or show cause, &c. A return was made to the alternative writ, containing eleven distinct defences. A motion was made to strike out the return, or for a peremptory writ notwithstanding such return, and Mr. Justice Roosevelt, July 1, 1859, made an order striking out all but the second, third, and fourth paragraphs of the return. The defendants appealed, and the general term affirmed the order as to what was left in, but reversed it as to the first and eleventh paragraphs. Issues were then taken and tried before Mr. Justice Emott and a jury, in April, 1860. The jury, under the direction of the court, found a general verdict for the defendants, the court directing the case to be heard in the first instance at general term.

The relator now moved, at general term, upon the pleadings, the orders relating thereto, and the minutes of the verdict, for a peremptory mandamus.

Gilbert Dean and James T. Brady, for the relator.—I. The relator, a policeman under the act of 1853, continued in office under the act of 1857, without taking a new oath, or taking any step whatever by way of assuming, or being inducted into office. (*The People on rel. McCune v. the present defendants*, 19 *N. Y.*, 188.)

II. It follows, therefore, that he is entitled to be restored to the enjoyment of the office of policeman unless he has been removed, and there is no pretence that he has been. A party holding office is entitled to its emoluments until he has resigned,

The People on rel. Hanrahan *a.* The Board of Police.

forfeited, or been removed from it. Neither event has happened in this case.

III. A mandamus is an appropriate remedy for a wrongful dispossession of an office.

IV. The act of April 14, 1860, is of no force in reference to this case. It does not repeal the act of 1853, or of 1857, nor remove from office, nor vacate the office of those who were policemen under those acts. It provides for the continuance in office, &c., of certain persons, but does not affect those who stood in the position of this relator. Besides, although the Legislature may abolish an office, they cannot continue it, and yet remove a particular incumbent. That power under our Constitution, and also under the Police laws, is to be exercised by some body other than the Legislature.

V. The court erred in directing a general verdict. When issues are framed and sent for trial, the jury must find on each separate issue, and then, on the verdict, an application must be made to the court for the writ. It cannot be claimed that there was no evidence to be submitted to the jury on any of these issues. The verdict in all these cases should be set aside.

Brown, Hall & Vanderpoel, and David Dudley Field, for the defendants.—I. Issue having been taken upon the return, the relator thereby admitted that, upon its face, it was a sufficient answer to the writ; and a verdict having been found for the defendants, judgment goes in their favor, of course. (*People a. Finger*, 24 *Barb.*, 341.) But in the present case, this court, both at the special and general terms, has passed upon the questions raised by the returns, and decided that they were a perfect answer to the writ, if proved to be true.

II. Independent of these considerations, the facts found by the jury are a plain answer to the application for a mandamus. 1. An officer, *de facto* and not *de jure*, has no claim to a mandamus for the office, or the fees belonging to it. (*People a. Tre-main*, 21 *Barb.*, 93.) 2. The relator was not compelled to take or hold office in the Metropolitan police against his will, and, having refused, his application for this mandamus is preposterous. (*Metropolitan Police Act*, § 12.) 3. The right to withdraw at any time, at will, belongs even to one who has expressly accepted the office. 4. Accepting a second office, incompatible

The People *on rel.* Hanrahan *a.* The Board of Police.

with the first, is a resignation or withdrawal from the first. (People *a.* Carrique, 2 *Hill*, 92.) 5. Entering into other and inconsistent employments is also a virtual withdrawal from a post which requires all the time of the incumbent. (Hughes *a.* Humphrey, 6 *B. & C.*, 680.)

III. Although it is supposed by the relator that the decision of the Court of Appeals in McCune's case (19 *N. Y.*, 188) contravenes some of these positions, a slight analysis of that case will show that it does not contravene one of them.

IV. The repeal of the Metropolitan Police Act of 1857, and the substitution of a new act in 1860 (*Laws of 1860*, ch. 258), would have taken from the relator all right to a mandamus, even if the other objections had not existed. The defendants are public officers, exercising a public trust, and they could not, if they would, recognize the relator as a member of the Metropolitan police district. Though the act of 1860 did not use the word repeal in reference to the act of 1857, yet the repeal was none the less perfect, since the new act was substituted for the old. The former was displaced, and the latter replaced it. The Metropolitan Police Act of 1857 being thus abrogated, the 32d section fell with it; that section, by force of which alone the Municipal police was transferred to the Metropolitan police. That section ceased to be law on the 14th of April, 1860, and has disappeared. The relator has never received an appointment from the Board of Police.

V. Though the fifth, sixth, seventh, eighth, ninth, and tenth defences were stricken out on motion, they still remain upon the record. The questions which they present are to be treated as if a demurrer had been interposed to each of them; and the defendants have an undoubted right to avail themselves of these defences, if good in law, being admitted to be true in fact. The defendants, therefore, submit that the decision upon the motion to strike out is not binding upon this court, now sitting at the general term to pronounce judgment upon the whole record.

BY THE COURT.*—MULLIN, J.—Before proceeding to examine the questions presented by the counsel for the respective parties, it becomes necessary to ascertain what the practice is in

* Present, CLERKE, P. J., MULLIN and LEONARD, JJ.

cases of issues upon the return to an alternative mandamus, in order to determine whether, upon the papers before us, the relator can be heard as upon a motion for a peremptory writ, or upon a motion for a new trial by reason of errors committed on the trial. It is provided by 3 Rev. Stat., 5 ed., 898, § 15, that "when a return shall be made to a writ of mandamus, the party prosecuting it may demur or plead to all or any of the material facts contained in the said return, to which the person making such return shall reply, take issue, or demur, and the like proceedings shall be had therein for the determination thereof, as might have been had if the person prosecuting such writ had brought his action on the case for a false return."

Section 17 provides that, "in case a verdict shall be found for the person suing such writ, or if judgment be given for him on demurrer or by default, he shall recover damages and costs, in like manner as he might have done in such action on the case as aforesaid, and a peremptory mandamus shall be granted to him without delay."

Section 471 of the Code of Procedure exempts proceedings on mandamus from the operation of the second part of the Code, and provides that "when an action shall be brought in consequence of such proceeding, such action shall be conducted in conformity to said act."

The trial of the issues in this case were conducted in conformity to the provisions of the Code, unless the form of the verdict is in violation of its provisions.

The jury find a general verdict in favor of the defendant. It is said that the jury should have found upon each of the issues separately, and that a general finding on them all was improper.

A general verdict is defined by section 260 of the Code of Procedure, as follows: "A general verdict is that by which the jury pronounce upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court."

By section 261 it is declared that "in every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon

The People *on rel.* Hanrahan *a.* The Board of Police.

particular questions of fact to be stated in writing, and may direct a finding thereon."

It follows from these provisions, first, that the jury had the right to render a general verdict in the case; and second, that the verdict rendered was a general one, and therefore regular.

If we were to treat the issues in this case as feigned issues sent down for trial pursuant to section 71 of the Code, the general provisions above cited apply, and a general verdict may be rendered. Such a verdict upon such an issue is a finding in favor of the relator or the defendant, that each of the issues are found in favor of the party in whose behalf the general verdict is found. And there is no difficulty in giving effect to such a verdict.

The decision in the case of Martin, decided at the last term, is not in conflict with the foregoing propositions. In that case the relator was nonsuited. The jury were not permitted to pass upon the issues of fact, and the relator was wholly deprived of the opportunity to satisfy the jury, and through them the court, that the matters on which the defendant relies as an excuse for not obeying the order of the court are not true. In this case both parties have been fully heard, and the jury, in the exercise of their discretion, have rendered a verdict on all the issues submitted. There is clearly no mistrial, nor is there any difficulty in giving effect to the verdict.

We must treat the application to the special term, from whose decision this appeal is taken, as a motion on the verdict and proceedings for a peremptory writ.

A motion for a new trial on the facts must be heard in the first instance at the special term, and cannot be made in the first instance in the general term. (*Howard's Code*, §§ 264, 265, and *notes*.)

No such motion has been made in this case, and of course no question arising on the facts can be heard here.

It was competent for the judge, before whom the trial was had, to direct the exceptions taken on the trial to be heard in the first instance at the general term. That order was made, but in this case the relator has not presented any question arising on the exceptions. And we must, under these circumstances, treat this proceeding as an appeal from an order denying the relator's motion for a peremptory mandamus.

We are now brought to the merits. Notwithstanding all the issues of fact have been found by the jury against the relator in this case, he nevertheless insists that he is entitled to a peremptory writ.

The defendants' counsel insists in the first place, that the general term having held after argument, upon a motion to strike out the issues, that they should be submitted to the jury, is equivalent to a decision that if such issues should be found in favor of the defendants, they would be a legal bar to the writ. There is some force in this argument. Yet I am of the opinion the court does not, and, as a general rule, ought not to hold itself bound by such a decision, so that it is not at liberty to grant or refuse the writ as it shall deem just and proper on the coming in of the verdict upon the issues of fact. In case of a feigned issue, it would not be contended that the decision that such an issue be found, is binding on the court, so that if the verdict should be with the defendants, it was precluded from giving relief to the relator. I consider that this is a much stronger case for the application of the rule contended for than feigned issues, yet even in this case, the court when it denied the motion to strike out, did not mean to preclude itself from thereafter considering the question as to the force and effect of the findings on the issues of fact.

We have been referred to the People *a.* Finger (24 *Barb.*, 341), as a decision of this question. But it is expressly stated by Justice Harris, that this question had not been argued before him, and it was not necessary to a decision of the case. The opinion of the learned justice, although entitled to our highest respect, is not binding upon us, and we think the practice suggested by him would unnecessarily restrict the power of the court to afford parties relief in cases of mandamus.

The issues tried in this case, and on which a verdict was found in favor of the defendants, were,

I. Whether the relator had received or had any valid appointment, warrant, or authority, as a member of the police force.

II. Whether the relator, upon the organization of the Board of Police under the act of 15th April, 1857, withdrew from the police force established by said act, and disclaimed holding office or doing duty as a member of the police force.

III. Whether the relator took office under the ordinance

The People *on rel.* Peck *a.* The Board of Police.

passed by the Common Council set forth in the case, and acted under said ordinance until the 3d of July, 1857.

IV. Whether the relator, since the passage of the act of April, 1857, for his private gain and profit, entered into other employments in no wise connected with, but inconsistent with his duties as a member of the police force, and received large profits therefor.

All these issues, except the third, were in the case of Gorman, and found by the jury in favor of the defendants. This court having, at the last term, held that these facts constitute no defence, we must hold in this case that, notwithstanding the finding of the issues in the defendants' favor, a peremptory mandamus must issue. The finding of the third issue in this case in favor of the defendants, does not, in the opinion of a majority of the court, change the result, and we must, therefore, hold that the order appealed from must be reversed and a peremptory mandamus issue.

It is due to myself to say that my views, as to the force of the facts found, are not changed; but the question being decided by a majority of the court in the cases heretofore argued, I am bound to give effect to the law as thus settled.

Let an order be entered that a peremptory mandamus issue.

THE PEOPLE *on rel.* PECK *a.* THE BOARD OF POLICE.

Supreme Court, First District; General Term, January, 1862.

MANDAMUS.—FINDING OF JURY.

It is competent for the jury on the trial of issues in mandamus cases to find a general verdict, and the court will give effect to it, if necessary, by applying it to the issues separately.

Where there is no conflicting evidence upon an issue before a jury, or the weight of evidence in favor of one party is so decided that the court would set aside an adverse verdict as against evidence, it is the duty of the judge to direct the jury what verdict to render.

A verdict found under the instruction of the court will be deemed rightly rendered in the absence of evidence to the contrary.

Motion for a peremptory mandamus.

The People on rel. Peck a. The Board of Police.

The relator in this case, Henry Peck, had been a member of the Municipal police force of the city of New York, and obtained an alternative writ of mandamus against the Board of Police of the Metropolitan Police District of the State of New York, in May, 1859. The present case is in all respects similar to that of *The People on rel. Hanrahan a. The Board of Police* (*Ante*, 151), and the proceedings in both cases were identical. The points relied on in the present case were the same with those in Hanrahan's case.

Gilbert Dean and *James T. Brady*, for the relator.

Brown, Hall & Vanderpoel, and *David Dudley Field*, for the defendants.

BY THE COURT.*—MULLIN, J.—In the case of Hanrahan we held that it was competent for the jury, on the trial of issues in mandamus cases, to find a general verdict, and the court will give effect to it, if necessary, by applying it to the issues separately.

If we are right in thus holding, the verdict in these cases is a valid one. And as no question arises on the effect of the evidence on the proceedings on the trial, there is enough in the papers before us to enable the court to dispose of the question arising on this appeal.

The fact that the court directed the jury to render the verdict, we must presume, in the absence of evidence to the contrary, to have been rightly done. Where there is no conflicting evidence upon an issue before a jury, or the weight of evidence is so decidedly in favor of one side that the court would set aside the verdict as against the evidence if rendered, it is the duty of the judge to direct the jury what verdict to render; and there is no statute or practice, nor any thing in the nature of the proceeding by mandamus, which takes away from the court the right in such cases to direct a verdict.

But as a majority of the court has held that a finding in favor of the defendants of the several issues sent to the jury in these cases for trial, does not bar the relator from having a peremptory writ, we must give effect to that decision in this case by reversing the order of the special term, and ordering the issuing of a peremptory writ. Motion granted.

* Present, CLERKE, P. J., MULLIN and LEONARD, JJ.

Mowbray *a.* Lawrence.

MOWBRAY *a.* LAWRENCE.*Supreme Court, First District; At Chambers, October, 1861.*

INJUNCTION AND RECEIVER.

The fact that a demurrer to the complaint, as not stating facts sufficient to constitute a cause of action, has been sustained by the court, is a conclusive answer to a motion upon the complaint for an injunction and receiver.

Motion for injunction and receiver.

This was an action against Lawrence, and Kelly, sheriff of New York county, to restrain such sheriff from selling partnership property of Mowbray & Lawrence, upon an execution against Lawrence alone. The defendant Kelly had demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and his demurrer was sustained. (See 13 *Ante*, 317.)

The plaintiff's motion for an injunction and receiver now came on for argument.

Nelson Smith, for the motion.

A. J. Vanderpoel, opposed.

BARNARD, J.—This motion is founded on the complaint in the action, and an affidavit of plaintiff swearing generally that he knows the contents of the complaint, and that the same is true, and consent of the defendant Lawrence to the appointment of a receiver. The motion is opposed by the sheriff. The complaint was demurred to, on the ground that it did not state facts sufficient to constitute a cause of action.

The demurrer has been argued and sustained.

I am bound by that decision.

Motion denied, with \$10 costs.

HOTALING *a.* MARSH.

Supreme Court, First District; General Term, March, 1862.

Again, at Special Term, March, 1862.

ALLOWANCES.—FUND IN COURT.—EQUITABLE ALLOWANCE FOR
COUNSEL-FEES.—AMENDMENT OF JUDGMENT.

The cases in which allowances are provided for in section 308 of the Code, are excluded from the operation of section 309 of the Code.

The power of courts of equity to grant counsel-fees out of a common fund belonging to the parties to the action, as a part of the relief which should be given on the final disposition of the cause, is not affected by the Code.

Provision, under the equitable power of the court, for the payment of counsel-fees out of a common fund belonging to the parties in the action, can be made only by the judge who tried the cause.

The mistakes which may be amended under section 173 of the Code, do not include judicial errors in rendering judgment.

In an action involving the construction of a will, the court have no power to amend the judgment after it has been entered, by inserting an allowance to certain of the parties, in addition to that given by § 308 of the Code, by way of indemnity to the expenses of the suit.

I.—Appeal from an order granting an allowance in addition to costs.

This was an action brought by Mary Hotaling and another, against Harriet Anne Marsh and others, for the partition of certain real property in the city of New York, devised by the late Abel S. Peters to certain of the parties in this suit.

The defendant, Harriet N. Marsh, interposed an answer, setting up that the will was void, or, if valid, that the construction of it set forth in the complaint was incorrect: the controverted points arose only in relation to the validity and construction of the will.

The cause had been tried at special term, Mr. Justice Leonard presiding, and judgment rendered establishing the validity of the will, and sustaining the construction which plaintiffs claimed

for it, and directing a sale of the property, and providing for its distribution.

The plaintiffs subsequently moved, at chambers, for an allowance in addition to their costs, and in addition to the \$60 to which they were entitled under section 308 of the Code. The motion was heard before Mr. Justice Clerke, who granted an allowance of different sums to various parties who had appeared in the action. His decision on that motion is given in *Hotaling a. Marsh*, 13 *Ante*, 297, *note*.

From this decision of Mr. Justice Clerke, the defendants, Harriet Anne Marsh and Mrs. Peters, took the present appeal.

Andrew Boardman, for the appellants.—I. Section 303 abolishes all costs and fees, except as provided for in the act. (6 *How. Pr.*, 11; *Buchanan a. Morrell*, 13 *Ib.*, 296; *Gray a. Robjohn*, 1 *Bosw.*, 618.) Section 306 places the costs of all parties in equity suits in the discretion of the court. Section 308 confines allowance in partition cases to the plaintiff, and limits it to \$60.

II. When an allowance exceeds the prescribed percentage, it is the subject of an appeal. (*Wilkinson a. Tiffany*, 4 *Abbotts' Pr.*, 98.) We represent two-thirds of the property, and, of course, two-thirds of any allowances would come out of our shares.

A. Underhill, for the respondents.—I. In such a case, the costs are allowed out of the fund; and on the ground that the will of testator being so ambiguous as to render it proper for the executor to take the direction of the court, as to its meaning, the costs of the necessary parties to the litigation is a proper charge upon the estate. (*King a. Strong*, 9 *Paige*, 94, 100; *Rogers a. Ross*, 4 *Johns. Ch.*, 608; *Pearson a. Pearson*, 1 *Sch. & Lef.*, 10, 12; *Beames on Eq. Costs*, 13, 14; 2 *Williams on Executors*, 1745, 6, 7; 2 *Barb. Ch.*, 332.) And costs are so allowed out of the fund, by way of rendering the proper equitable relief in the cause, and are not mere personal costs. (*Angell a. Davis*, 4 *Mylne & Cr.*, 360, 6; *Sawyer a. Baldwin*, 20 *Pick.*, 378, 388; *Jewett a. Woodward*, 1 *Edw.*, 195, 200.) Thus guardians *ad litem*, in equity suits, where there is a fund under the control of the court, as in actions to foreclose a mortgage, are now constantly allowed their costs, although the fund may

not be large enough to pay the mortgage-debt, and the infant may have no interest in the fund at all. So, too, in *Wilson a. Wilson* (32 *Barb.*, 328), all parties were allowed the costs out of the fund, including those that were unsuccessful, and who did not recover. This case is exactly parallel with ours. Such costs are afforded as a part of the equitable relief in the cause, and not as mere personal costs. (2 *Barb. Ch.*, 328.)

II. So much are costs of this kind awarded by way of relief, and not as a personal recovery against the opposite party, that under the former practice they were not limited to the amount which a party has a right to tax against the opposite party on a recovery, but were increased, where the court deemed it proper to make the relief full, to such amount as the solicitor of the party to whom they were granted would be entitled to recover against his client. That is, costs are allowed in such case out of the fund, to be taxed as between solicitor and client, as the proper equitable relief in this behalf. (*Beames Eq. Costs*, 214, 216; 2 *Williams on Exec.*, 1745; *Barker a. Wardley*, 2 *M. & Keen*, 818; cited and approved, 2 *Barb. Ch.*, 338; *Brodie a. Bolten*, 3 *M. & Keen*, 168; *Sutton a. Doggett*, 3 *Beav.*, 9; *Tostal a. Spicer*, 4 *Sim.*, 510; 2 *Barb. Ch.*, 336-338; *Jewett a. Woodward*, 2 *Edw.*, 195, 200; *Irving a. De Kay*, 9 *Paige*, 521, 533.) It is only where there is a fund under the control of the court, that costs, as between solicitor and client, are given. (2 *Barb. Ch.*, 338.) And this also includes reasonable counsel-fees. (*Irving a. De Kay*, 9 *Paige*, 521, 533; *Minuse a. Cox*, 5 *Johns. Ch.*, 440, 451.)

III. Costs when adjudged as between solicitor and client, it should be observed, covered reasonable counsel-fees that the client may have been obliged to pay. (*Irving a. De Kay*, 9 *Paige*, 521, 533; *Minuse a. Cox*, 5 *Johns. Ch.*, 440, 451.) So obvious is the principle contended for here, when an executor or trustee is the party whose claims are addressed to the court, that the appellant here has not appealed from that part of the order granting costs to the executors. And note the position an executor would after be in, if the court repudiates the principle contended here. And the very party objecting here, is the one who caused these extra costs. The taxed costs here are immaterial. It might have all been put by way of allowance, as was done in *Phelps a. Pond*, the court graduating

Hoteling *v.* Marsh.

the allowance by the amount of taxed costs. The percentage in section 308 is as much a part of the fixed costs, and outside of discretion, as any part of the fee-bill. There is no discretion about it.

BY THE COURT.*—LEONARD, J.—The allowances in this case were made under the authority of section 309 of the Code; they are in addition to costs, as every allowance must be which is made under that section, and are not the allowances known in the late Court of Chancery.

The action is in part for the construction of a will. Allowances in such cases are provided for in section 308, and are excluded or excepted from the operation of section 309.

It is said that the authority to grant counsel-fees out of a common fund belonging to the parties to the action has been long exercised by courts of equity, and has not been interfered with by the Code.

Such a power has been recently exercised by the Court of Appeals in a similar case,† and we are not disposed to deny the justice or authority of the precedent.

The authority to grant such fees by a court of equity, in proper cases, has usually been exercised by the chancellor or judge, while he was possessed of the cause; and was embraced in the judgment as part of the relief or equity which ought to govern its final disposition. Had the allowances in this action been so made, we should be disposed to follow the precedent of the court of last resort, and not interfere with them in this case. They were not made, however, by the justice who heard the cause, as part of the judgment which was finally pronounced.

They do not constitute any part of the equitable disposition which the court made in settling the rights of the parties, but were made by another justice, and, as before observed, under the authority of the Code only.

The order making the allowances is reversed, without costs, and without prejudice to an application to the justice who tried the cause.

INGRAHAM, P. J.—I concur.

* Present, INGRAHAM, P. J., CLERKE and LEONARD, JJ.

† The case referred to is that of *Phelps v. Pond*, reported on another point, 23 N. Y., 69.

Hoteling a. Marsh.

II.—Motion to modify the judgment, and for an allowance.

The plaintiffs now moved, pursuant to leave, reserved in the foregoing decision of the general term, before Mr. Justice Leonard, who had tried the cause, to modify the judgment by inserting an allowance to certain of the parties by way of indemnity for their expenses incurred in the action.

A. Underhill, for the motion, relied upon the decision of the general term, and the points and authorities there presented by him.

Andrew Boardman, opposed.—I. The judgment in this case is enrolled and cannot be disturbed except on appeal or on a new trial granted on a proper application for that purpose, and for a cause recognized by the law as sufficient. This is not such an application, and if it were, no cause for a new trial is shown.

II. This is a partition-suit and nothing else. The fact that the shares and interests of the parties had to be ascertained by construing the will through which they derived title does not alter its character. It was a mere incident like the construction of a deed or any other instrument, but if it were a suit for such construction the statute as to costs is equally applicable.

III. Section 303 of the Code prevents any allowance such as is asked for. What words could the lawmakers have used to more effectually prohibit such fees as this motion asks for. The plaintiffs ask the court to construe a statute off the statute-book. (*Code*, § 303.)

IV. The idea that there is a fund in court under its charge which it may administer, has no foundation. To partition property among tenants in common is not a peculiar power of equity. The rights of the parties to their respective shares are legal rights. That there is any fund at all is a mere incident arising out of the property being so circumstanced as not to be conveniently capable of actual partition. The proceeds represent the shares of the parties, and no more constitute a fund in court than do the proceeds of an execution.

LEONARD, J.—Any mistake may be amended before or after judgment. (*Code*, § 173.)

Taylor *a.* Baldwin.

The mistakes here referred to are not judicial errors in rendering judgment; those are to be corrected in another manner.

The amendment now asked for is one that relates to the relief granted by the court at the hearing of the cause, or rather to the omission to grant the whole relief which the case would permit.

In 19 *Johns.*, 244, the amount of the judgment was corrected after a satisfaction-piece had been filed, and a reassessment of damages was directed. It was effected, however, by opening the judgment and rehearing the case on assessment; not by an arbitrary alteration of the amount, without any authorized report or ascertaining of the sum due.

The amendment here asked for is not within the provision of the statute for that purpose.

If a judicial mistake has been made, it has sometimes been corrected by vacating the judgment and rehearing the case on the merits; as in case of surprise, newly discovered evidence, &c.

Such is not, however, the nature of the application here.

The application is denied without costs.

TAYLOR *a.* BALDWIN.

Supreme Court, First District; At Chambers, March, 1862.

ACTION AGAINST RECEIVER BROUGHT WITHOUT LEAVE.—CONVICTION FOR CONTEMPT.

It is a contempt to bring an action against a receiver, without leave of the court which appointed him; and the proceedings in such an action will be stayed. On an order to show cause why a party should not be punished for contempt, a conviction may be had, and punishment imposed, without issuing an attachment or filing interrogatories.

Motion by a receiver to punish for contempt the plaintiff who had brought this action against the receiver without leave, and to stay the proceedings in such action.

Judgment was obtained in this action by Thomas T. Taylor and another against Samuel Baldwin, and the judgment-roll filed in the clerk's office of the city and county of New York; and proceedings supplementary to the return of an execution unsatisfied were instituted, and Nelson Smith appointed receiver, April 28, 1860, by a justice of this court, in the city of New York. After his appointment, the receiver instituted a suit to obtain the possession, among other things, of a quantity of jewelry which had belonged to the defendant, and which it was alleged he had transferred to defraud his creditors.

In that suit judgment was rendered in favor of the receiver, under which he came into possession of the jewelry. Subsequently thereto, one George R. Downing, who was not a party to the suit brought by the receiver, claimed that this lot of jewelry belonged to him, and demanded of the receiver, who was in possession, to deliver the same to him. This the receiver declined to do except upon an order of the court. Thereupon Downing made an application to the court in this action, that the jewelry be delivered to him. This application was denied, with liberty to take a reference to ascertain the facts. Downing did not avail himself of the privilege granted by this order, but subsequently, and on December 17, 1861, commenced an action against Nelson Smith (who is the same person appointed receiver) in this court, laying the venue in Kings county, to recover for withholding this lot of jewelry. This action was commenced by summons, without complaint and without leave of court. The receiver now moved to perpetually stay Downing's proceedings in that action, and to punish Downing for contempt.

Nelson Smith and L. J. Goodale, for the motion.—I. A receiver, from the moment of his appointment, is an officer of the court (*Bennett on Receivers*, 1; *Edwards on Receivers*, 3); appointed to receive and hold the things in controversy for whosoever can make out title to it. (*Postman v. Mills*, 8 *Lon. Jur.*, N. S., 161.) He represents the interests of all concerned. (*Idings v. Bruen*, 4 *Sandf. Ch.*, 417.)

II. The possession of the receiver, being the possession of the court itself, will not be permitted to be disturbed without special leave. (*Angel v. Smith*, 9 *Ves.*, 335; *Noe v. Gibson*, 7 *Paige*,

Taylor & Baldwin.

513; *Brooks v. Greathead*, 1 *Jac. & Walker*, 178; *Matter of the N. A. Gutta Percha Co.*, 17 *How. Pr.*, 549, 553.)

III. Any interference with the receiver is a contempt to the court, on the principle that an interference with the receiver is an interference with the court. (*Angel v. Smith*, 9 *Ves.*, 335; *Noe v. Gibson*, 7 *Paige*, 513; *Broad v. Wickham*, 4 *Sim.*, 511.) To commence an action against a receiver without leave, is an interference and a contempt. (*Noe v. Gibson*, *supra*; *Aston v. Heron*, 2 *Myl. & Keen*, 390; 2 *Paige*, 422; *Matter of Heller*, 3 *Ib.*, 199; *Matter of Hopper*, 5 *Ib.*, 489.)

IV. The court may not only punish the person who commences an action against its receiver without leave, but will restrain the further prosecution of the action. (*Aston v. Heron*, 2 *Myl. & Keen*, 390; *Ward v. Lawrence*, 1 *Jac. & Walker*, 655; *Turk v. Rundle*, 10 *Beav.*, 318.) Where a proceeding is begun which questions the title of the receiver, then the court will undoubtedly restrain the further prosecution of the action. (*Aston v. Heron*, 2 *Myl. & Keen*, 390.) Here the action against the receiver to recover for the property placed in his hands, under the orders of the court, on the ground that he had converted it by holding it pursuant to such orders, directly disputes the title of the receiver, and the court will certainly protect its own officers and restrain the action.

V. Inasmuch as the receiver holds the property in controversy for whoever can make out a title to it, the proper course for a person claiming the property is to apply to the court. (*Angel v. Smith*, 9 *Ves.*, 335; *Noe v. Gibson*, 7 *Paige*, 513, 515; *Matter of Heller*, 3 *Ib.*, 199.) *Downing* did apply in this case, and his application was denied, and this is an additional reason why he should be punished, as he appears to have acted wilfully.

VI. The statute allows of two modes of proceeding against a person for contempt to enforce civil remedies: one by an order to show cause, or a notice of motion, as was pursued in this case; and the other by attachment. (2 *Rev. Stat.*, 535, § 5; *Albany City Bank v. Schermerhorn*, 9 *Paige*, 372.)

Cox & Avery, opposed.—I. The court has not ordered *Smith* to take possession, &c., of any particular property, only the property of *Baldwin*, and no notice was given to *Downing*.

Taylor *a.* Baldwin.

II. Permission to sue is only necessary where the plaintiff is a constituent of the receiver, and wishes to call him to account; not so here. See *Angel a. Smith* (9 *Ves.*, 337), which is a leading case. There, although no leave had been obtained, the action (ejectment) was allowed to proceed. (See, also, 5 *Paige*, 131; 7 *Ib.*, 516.)

III. Leave to sue for a tort has never been held essential. Such a doctrine implies the power to deny and prevent the exercise of the right to sue. This court, in *Hubbell a. Dana* (9 *How. Pr.*, 425), refuses to recognize any such rule.

IV. By setting up his defence of receivership, as an equitable answer, the court can protect all Mr. Smith's equities: there is no presumption that he will be oppressed.

BARNARD, J.—The suit of Downing was commenced by summons, without complaint, and Smith was not described therein as receiver; Smith consequently could not, until after he had appeared and obtained a complaint upon demand made, know that he was sued as receiver; the fact that he has appeared does not, therefore, waive the objection he now raises that he has been sued as receiver, without leave of the court first obtained. Since he became aware that that suit was brought against him as receiver, he has taken no steps therein.

It is necessary that a party desiring to sue a receiver, should first obtain leave of the court that appointed the receiver.

Under the circumstances of this case, the court might possibly have refused such leave, as from the papers used on this motion, it appears that said Downing moved this court for the same relief that he subsequently sought to obtain by his action, and his application was denied.

Motion granted, adjudging said Downing guilty of contempt, and fining him fifty dollars as an indemnity to the receiver for his costs and expenses; and staying said Downing's proceedings in the action commenced by him against the receiver, with leave to said Downing, on payment of said fifty dollars, to move for leave to prosecute his action.

BARKER *a.* WHEELER.

Supreme Court, Fifth District; General Term, April, 1862.

VACATING ORDER OF ARREST AFTER JUDGMENT.

The provision of section 204 of the Code is obligatory, not permissive, so that a motion to vacate an order of arrest cannot be made after the entry of judgment in the action.*

Appeal from an order vacating an order of arrest.

This was an action brought by John W. Barker and another, against William W. Wheeler, upon two acceptances made by him. The action was commenced on the third day of September, 1861, by the service of a summons and complaint, the latter containing no allegations of fraud. The plaintiffs procured an order of arrest against the defendant upon affidavits imputing fraud in contracting the debt. The defendant was taken upon the order at Trenton, Oneida county, on the 25th day of September, 1861, at about 11 A. M. On the afternoon of the same day plaintiffs entered judgment for want of an answer in the Onondaga county clerk's office. The defendant moved upon affidavits to set aside the order of arrest. The plaintiffs resisted the motion upon new affidavits. The court vacated the order, and the plaintiffs took the present appeal.

Andrew H. Green, for the appellants.

Montgomery H. Throop, for the respondent.

BY THE COURT.†—MULLIN, P. J.—I am of the opinion that on the facts presented by the papers on this appeal, the learned

* Compare, however, section 183, as amended in 1862, which provides that "the defendant shall have twenty days after the service of the order of arrest in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail."

† Present, MULLIN, P. J., MORGAN and BACON, JJ.

justice was right in granting the motion to set aside the order of arrest. The defendant's affidavits fully meet and rebut the allegations on which the order was granted.

The plaintiffs' counsel insists, however, that the defendant could not move, after judgment was entered, to vacate said order.

The Code (§ 204) provides "that a defendant arrested may at any time before judgment apply on motion to vacate the order of arrest, or reduce the amount of bail." If there was no statutory provision or rule of practice in the way, there could be no doubt of the power of the court to relieve a defendant improperly arrested at any time.

It only remains to inquire whether the provision of the Code above cited takes away from the court the power to grant relief, or whether there is some rule of practice which has that effect.

The language of section 204 is, that a defendant arrested, may, at any time before judgment, apply on motion to vacate the order, &c. Judgment was in fact entered before the motion was made; and hence, if the provision is obligatory and not permissive, the motion was too late and the order must be reversed.

Although the language of the section is permissive, still that is by no means decisive; for in the construction of statutes "may" not unfrequently has the force of the imperative "must" or "shall," and the latter words have no greater force than "may." In order to ascertain somewhat more clearly than is disclosed by the words of the statute what the intention of the Legislature was in enacting the section cited, let us ascertain what the practice was in regard to motions to vacate arrests before the enactment of the Code. At common law, in those cases in which the defendant might be arrested and was obliged to give special bail, he was entitled after arrest to an order from the judge at chambers, requiring the plaintiff to show cause of action at a time and place to be specified in the order. (*Graham's Pr.*, 159.)

The plaintiff, at the time and place designated, produced the affidavit on which the defendant was held to bail,—or one prepared for the occasion,—and thereupon the judge either permitted the defendant to introduce counter-affidavits, vacated the

Barker *a.* Wheeler.

order to show cause, or discharged on common bail, or on indorsing an appearance on the writ, or he mitigated the bail. (*Id.*, 162.)

If the defendant was a privileged person, or for any other reason was not subject to arrest, the judge discharged him on filing common bail.

If he was arrested without an affidavit to hold to bail, or without a judge's order of arrest, or if the affidavit to hold to bail was defective, the judge discharged the defendant on filing common bail or indorsing his appearance. (*Id.*, 163.)

When the defendant had voluntarily given bail without being arrested, it was held that he had thereby waived objection to the affidavit to hold to bail. (*Id.*)

Nor could the affidavit be objected to after bail had been perfected or even put in, or after judgment by default and notice of executing a writ of inquiry. (*Id.*, 164.)

It will be perceived, that if the common-law practice was in force, the motion to set aside the order of arrest could not be made after judgment.

The Code swept away the old practice and substituted its own provisions in the place, and in many instances adopted the rules of the old practice into the new. Section 179 of the Code of 1848 provided that a defendant arrested might, at any time "before the justification of bail," apply on motion to vacate the order of arrest, &c. By section 167 of the Code of 1848 and the subsequent sections, it was the duty of the sheriff to deliver to the plaintiff's attorney the undertaking of bail, and the attorney had ten days within which to except to the bail, and if he did not except, he was deemed to have accepted it. If the bail was excepted to, it was made the duty of the sheriff or the defendant to justify the bail, or to put in new bail on notice to the plaintiff. If the bail was allowed, the sheriff was discharged. If not allowed, new bail must have been put in. Bail became perfected at the end of ten days from the delivery of the undertaking by the sheriff to the plaintiff's attorney, and, also on allowance after exception, and notice of justification. This uncertainty, as to when the motion to set aside the order of arrest under the provisions of the Code above cited could be made, led to the amendment of the section prescribing the time within which the motion must be made, by striking out the words

Barker a. Wheeler.

"*the justification of bail*," and inserting in lieu thereof the word "*judgment*," so as to make the section (204) read as copied above.

Before the amendment, section 179 was treated by the courts as mandatory. (*Barber a. Hubbard*, 8 *Code R.*, 156, 169; *Lewis a. Truesdell*, 1 *Ib.*, *N.S.*, 106; *Baker a. Dillon*, *Ib.*, 206.)

If such was the correct interpretation of the provision before the amendment, it is none the less so now. We have then, 1st, The well-settled practice of the courts before the adoption of the Code, which would not permit a defendant to move to set aside his arrest after judgment; 2d. The Code, as first adopted, prescribed a time within which the motion might be made, and the courts held it to be mandatory; and 3d, An amendment of the same provision without altering in any sense the meaning of the section.

It seemed to me that we must hold, in view of the authorities, that the motion cannot be made after judgment.

If we should disregard the statute altogether, and fall back on the practice as it was before the Code, the same result must follow.

The defendant's counsel insists that the construction above suggested ought not to be given to the section of the Code under consideration, because, by the alteration in the practice brought about by the Code, the right which the former practice secured to the defendant, to be relieved from arrest, is, under the construction we give to section 204, taken away; or it may be defeated by the plaintiffs' serving the order so near the time of recovering judgment, as to altogether prevent the defendant from making his motion "before judgment."

It is true that if we are right in our construction the plaintiff may, in all cases, defeat a motion to set aside the order of arrest. But the remedy is not with the court. A case has occurred which the codifiers did not anticipate, and which requires legislative interference. That it was the intention of the authors of the Code to designate a time before which the motion must be made I entertain no doubt, and it is for them to furnish a remedy against the abuse to which the section under consideration gives rise.

I am of the opinion the order appealed from should be reversed. Ordered accordingly.

Gilman *a.* Oliver.

GILMAN *a.* OLIVER.*New York Superior Court; General Term, April, 1862.*

COSTS.—STENOGRAPHER'S FEES.

The fees of a stenographer, whose employment is directed by the court under section 256 of the Code of Procedure, cannot be taxed as costs in the cause.

Appeal from an order denying a motion to amend a bill of costs.

The action was brought by Julius S. Gilman against Isaac J. Oliver.

At the trial of the action, the court directed the employment of a stenographer, under section 256 of the Code—half the expense to be paid by each party. On taxing the costs, the defendant, in whose favor judgment was rendered, claimed to be allowed the amount paid by him to the stenographer. The clerk refused to insert this item in the bill of costs, and the defendant moved at special term to correct the bill of costs by inserting such item. The motion was denied, and the defendant appealed.

E. R. Robinson, for the appellant.

Comstock & Hartwick, for the respondent.

BY THE COURT.*—MONCRIEF, J.—Section 256 of the Code provides, that in the First Judicial District, “the courts may direct the employment of a stenographer in such cases as appear to them to require it, and may order the expenses occasioned thereby to be paid by the parties, not exceeding, however, five dollars a day to each party.”

We understand from the papers, that in this case, the court directed the employment of a stenographer, and ordered, that

* Present, BARBOUR, MONCRIEF, and MONELL, JJ.

Gilman v. Oliver.

each party should pay half of such expense, that the order allowed a *per diem* compensation of \$10, and that the cause was tried in a day. That under this order the stenographer performed the services he was employed to perform, and that in obedience to this order, the defendant paid to the stenographer the sum of five dollars, which sum he now claims a right to tax in his costs as a necessary disbursement.

The first objection to this claim is, that the defendant now seeks to recover from the plaintiff the sum of five dollars, which, by an order in the cause, he was directed to pay personally.

To allow this claim, is to permit him to recover the amount of this item from the plaintiff, contrary to the terms of this order, and in opposition to it.

If the Legislature had not designed this order to be final and absolute in respect to the rights and liabilities of the parties on account of moneys paid under it, we should naturally expect there would have been some further provisions to indicate that such was not the design. The provision empowering the courts to direct the employment of a stenographer, fix his compensation and order its payment, is incorporated into the Code, by amending its 256th section (*Laws of 1860, 785, § 8*), and not by amending any section relating to the subject of costs. It was necessary to provide some mode of securing payment of this compensation, and the means of enforcing payment; and if the Legislature had intended that the prevailing party should recover the moneys paid to the stenographer, as a disbursement, we should expect that the act would have so declared, or at least have contained some provision justifying the inference of such an intent. But, instead of that, this statutory provision, which provides fully for the whole matter, confers no discretionary authority upon the court in respect to the party who is to be ordered to pay the expense. The order directing the employment of a stenographer, fixes the liability of the parties in regard to the expense, and it is as truly final as any order in the cause which the court is authorized to make.

It is a special provision, not affecting suitors generally, but only parties to actions pending in the First Judicial District. It is not an expense to which parties in any other Judicial District can be subjected; and it seems to have been enacted on the theory that in the discretion of the court, in causes in the

Gilman *a.* Oliver.

First Judicial District, the parties may be subjected to this expense with advantage to both of them, and that they should bear it equally, no matter which party eventually succeeded.

The defendant cannot recover the five dollars of the plaintiff, unless he may recover it without any law in terms authorizing him to do so, but in opposition to the terms of an order in the cause directing him to bear the expense personally, which order is made under and in conformity to a statute relating to the precise matter, and being the whole and only law affecting the question.

While the counsel for the appellant differs from this conclusion (as held by Bosworth, Ch. J., in *Arnoux a. Phelan*, 21 *How. Pr.*, 88), he has not pointed to any adverse view except as stated in *The Transcript*, March 18, 1861 (*Reynolds a. The Mayor, &c.*), in which Judge Hilton is reported as deciding "that the amount paid for stenographer's fee might be allowed to the prevailing party on the adjustment of costs as a necessary disbursement; that the mode of payment at the trial being one half by each party, was only for the security of the stenographer and for the protection of the court that directs him to be employed, and that it could not alter the rule that costs are given as an indemnity for a party's expenses, and of course includes such an expense."*

This security to the stenographer and protection to the court would be as ample if the statute directed, or the court could

* IN *REYNOLDS a. THE MAYOR, &c., OF NEW YORK* (*New York Common Pleas; At Chambers, March, 1861*), it was *Held*, that the amount paid for stenographer's fee should be allowed to the prevailing party on the adjustment of costs as a necessary disbursement.

This was an action brought by Catherine Reynolds against the Mayor, Aldermen, and Commonalty of the city of New York, to recover damages for personal injuries received by being thrown from a wagon in consequence of a defect in one of the public streets of the city. The plaintiff obtained a verdict for \$75. On the adjustment of costs the clerk declined to allow the plaintiff the amount paid by her as stenographer's fee. The plaintiff now applied to the court to insert in the costs as adjusted the amount so paid.

R. B. Roosevelt, for the plaintiff.

W. C. Trull, for the defendants.

HILTON, J., decided orally, that the amount paid for stenographer's fee might be allowed to the prevailing party, on the adjustment of costs, as a necessary disbursement; that the mode of payment at the trial being one half by each party, was only for the security of the stenographer, and for the protection of the

Gilman & Oliver.

order, the whole sum to be paid by either party, instead of dividing the expense between the parties. Section 311 (§ 256) of the Code, as originally enacted, directed the clerk to insert only "the necessary disbursements allowed by law, including the compensation of referees and the expense of printing the papers upon any appeal." (*Laws of 1848*, 546.)

The amendment of 1849 added, "and fees of officers allowed by law." (*Laws of 1849*, 678.) The necessary disbursements and fees of officers allowed by law are specified and authorized by sections 311, 312, and 313 of the Code, and such parts of the Revised Statutes relating to "services done or performed in the several courts of law and equity in this State by the officers thereof" (2 *Rev. Stat.*, 622), as have not been superseded by the Code.

Neither the Revised Statutes nor the Code at this time (1849) made provision for the fees of witnesses examined on a commission out of this State, or for the other expenses of the commission; and it was held in this court that such fees and expenses could not be inserted in the costs of the prevailing party, not being allowed by law. Such fees and expenses were not taxable under the Revised Statutes.

The necessary disbursement for printing papers required by a rule of the court was not allowed.

The amendment of 1857, directs the clerk to insert . . . "the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing when required by a rule of court."

The disbursement, however necessary, and actually paid in good faith by a prevailing party to a commissioner for taking a deposition, would seem to be restricted, and must be confined to a reasonable compensation.

The fees paid to a solicitor for attending the examination of witnesses abroad cannot be inserted as a disbursement. (11 *Ab-*

court that directs him to be employed, and could not alter the rule that costs are given as an indemnity for a party's expenses, and of course includes such expense.*

Motion granted.

* We are informed that the other judges of the court concurred in this conclusion.

 Platt *a.* Stout.

botts' Pr., 152.) Stenographers' fees were not a necessary disbursement allowed to the prevailing party at the time section 311 was enacted or amended; such persons were unknown to the law until the act of 1860; although it was not unusual previous to this time for parties to employ a reporter to take the minutes of a trial.

Section 20 (2 *Rev. Stat.*, 634) is repealed by the Code. (See note, 3 *Rev. Stat.*, 5 ed., 911.)

It is plain that if the prevailing party is entitled, by way of indemnity or otherwise, to his expenses, the Code falls far short of authority to allow very many of his necessary and "actual disbursements."

The order appealed from is clearly right, and must be affirmed with costs.

PLATT *a.* STOUT.

Supreme Court, First District; General Term, April, 1862.

PLEADING.—AVERMENT OF TITLE TO PUBLIC OFFICE.—EMOLUMENTS OF OFFICE.—ASSIGNABILITY OF CAUSE OF ACTION.

In pleading a party's title to public office, an averment that under and in pursuance of the laws of this State, on a specified day he was duly appointed to fill such office, and duly made and executed his official bond with sureties, and took the oath of office required by law, and was thereby constituted such officer, and was thenceforth entitled to hold and administer such office, is sufficient on demurrer.

An action is maintainable against a person who has wrongfully received the fees of an office, which the plaintiff holds or is entitled to hold, to recover such fees.

A cause of action in favor of a public officer, against an intruder, for wrongfully receiving the fees of the office, is assignable.

Demurrer to a complaint.

This action was brought by George W. Platt, assignee of Nathan C. Platt, against Andrew V. Stout, to recover the sum of \$2,000 received by Stout for fees as chamberlain of the city of New York.

Platt *v.* Stout.

The complaint averred that prior to the 14th day of May, 1860, the defendant was in possession of, and claimed to hold and administer the office of chamberlain of the city and county of New York.

That on or about the 14th day of May, 1860, under and in pursuance of the laws of the State of New York, Nathan C. Platt was duly appointed to fill the said office, and was constituted thereby the chamberlain of the city and county of New York in place of the defendant, and Nathan C. Platt thereupon duly made and executed the official bond with the sureties, and took the oath of office required by law of the persons who are appointed to hold the same; and after that date, and until on and after the 7th day of June, 1860, Nathan C. Platt was entitled to hold and administer said office, and to receive the fees, emoluments, and commissions appertaining thereto.

That Nathan C. Platt thereupon gave due notice to the defendant of all and singular the said facts, and demanded that defendant relinquish the office to him, and deliver to him the books and papers belonging to the same, all which the defendant refused to do; and he wrongfully and unlawfully usurped and continued to exercise and perform the duties of said office, and to receive the emoluments, fees, and commissions thereof, until on and after the 7th day of June, 1860.

And the plaintiff further alleges, upon information and belief, that between the 14th day of May, 1860, and the 7th day of June, 1860, the defendant, so unlawfully exercising and performing the duties of the office of chamberlain of the city and county of New York, collected and received, as such pretended chamberlain, under color of the said office, the sum of two hundred thousand dollars for State taxes, collected in the city and county of New York, which taxes the chamberlain of the city and county of New York was empowered and required by law to receive and pay over forthwith to the treasurer of the State of New York, and to demand and receive therefor the commission and fee of one per cent. on every dollar, which he should so receive and pay; that on or about the 5th day of June, 1860, the defendant paid over to the treasurer of the State of New York the sum of one hundred and ninety-eight thousand dollars (part of said sum of two hundred thousand dollars), and retained and appropriated to his own use the balance

thereof, to wit: the sum of two thousand dollars as and for his commissions and fees thereupon.

That Nathan C. Platt, as chamberlain of the city and county of New York, was entitled to receive and pay said sum of two hundred thousand dollars, and to receive the said sum of two thousand dollars for commissions allowed by law thereupon; and that said sum of money was so received and paid over by the defendant, and the said commissions thereupon were retained by him for the use and for the benefit of said Nathan C. Platt, as such chamberlain as aforesaid.

That Nathan C. Platt, before the commencement of this action, duly assigned to this plaintiff the said claim, demand, and cause of action against the defendant, that the defendant had not paid the same nor any part thereof to the said Nathan C. Platt, nor to this plaintiff, though frequently thereunto requested; but, on the contrary, thereof unjustly retained and withheld the same, and that the plaintiff was the lawful owner of said claim, and justly entitled to recover the amount thereof from the defendant.

The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Robert W. Andrews, in support of the demurrer.—I. The complaint does not state by whom N. C. Platt was appointed city chamberlain. The city chamberlain is a creature of the statute, and the mode of his appointment is prescribed, and in pleading his appointment, it is necessary to set forth the mode and manner of his appointment. Section 161 of the Code does not apply to a case like this. It only applies to a judicial proceeding in a court of the State. The complaint should state what bond was given, its conditions, and by whom approved; and, also, under what statute Nathan C. Platt was appointed.

II. It appears that the moneys received by the defendant were the moneys of the State and not the moneys of Nathan C. Platt. Platt has no claim whatever to them. If defendant has not paid over all the moneys received by him to the State, the plaintiff as assignee of N. C. Platt can have no claim upon him. If he is indebted to any one, it is to the State. If the State chose to permit defendant to retain any portion of the money, the plaintiff has no right to complain. The plaintiff

cannot avail himself of any appropriation by defendant to his own use of moneys belonging to this State.

III. If the plaintiff was entitled to receive and pay over such moneys, and in the language of the complaint "to receive and demand therefor the commission and fee of one per cent. on every dollar, which he shall receive and pay out as aforesaid," he was entitled to receive and demand the same from the State. He has no claim against the defendant.

IV. The allegation that these moneys were retained by the defendant for the use and benefit of Nathan C. Platt, cannot alter the relations of the parties. That is a question of law, and not of fact. If a party is elected or appointed to a public office, and another assumes to act or is permitted to act as such public officer, and receives from the State or county the salary or emoluments of the office, the person so elected or appointed has his claim against the State or county, and not against the party assuming to act.

John L. Sutherland, opposed.—I. All the material allegations of the complaint are statements of facts, not of conclusions. (The People *a.* Ryder, 12 *N. Y.*, 433; The People *a.* Walker, 23 *Barb.*, 305; Cady *a.* Allen, 22 *Ib.*, 395; 3 *Edw.*, 570.) And from these it will be implied that every thing was done which was necessary to render the appointment and title of Nathan C. Platt to this office regular and effective. Facts, however material, if necessarily implied in any fact expressly stated, need not themselves be substantively alleged. (*Gould's Pleadings*, 50, § 6.) The chamberlain is a public officer, under public statutes.

II. These statements of facts being admitted by the demurrer, it was not necessary to allege by whom, or under what particular act of the Legislature or Common Council, the appointment was made; nor where the bond was given, nor by whom approved, nor the amount of it. These are merely probative facts, which need never be alleged. (*Hyott a. McMahon*, 25 *Barb.*, 458.) If the complaint is defective, in not alleging with sufficient particularity when and how Mr. Platt's appointment was made and perfected, the remedy is not by demurrer, but by motion under section 160 of the Code, to make the complaint more definite and certain. (5 *Abbotts' Pr.*, 482.)

Platt *a. Stout*.

III. There can be no action against the State. It is a mistake to say that the moneys to recover which this action is brought ever belonged to the State.

IV. The action lies at common law to recover these fees and commissions. "If a man receives the profits of an office, upon pretence of a title, an *indebitatus assumpsit* lies by him who has the right to them, as for money received to his use." (1 *Comyn's Digest*, 287, ed. 1824, title, Action upon the case upon assumpsit; seven cases cited.) "The action for money had and received, is maintainable to recover from a party who has wrongfully received the fees of an office, while the plaintiff holds or is entitled to hold the amount of such fees." (6 *Taunt.*, 681, 683; 6 *Mees. & W.*, 639; 1 *Scott*, 539.) The title to the office may be tried in this form of action. Ever since the time of Charles II., it has been held that the title to an office may be tried in an action for the fees had and received. (Lightly *a. Clouston*, 1 *Taunt.*, 114, 115; *Greene a. Hewett*, *Peake*, 182, 185; *Lamine a. Dorbeel*, 2 *Lord Raym.*, 1217; *Allen a. McKeon*, 1 *Sumner*, 317; see *Chitty on Contracts*, 555, note *a.*)

V. The cause of action is assignable. All such causes of action as survive to the personal representatives are assignable, even though sounding in tort. (*Butler a. N. Y. & Erie R. R. Co.*, 22 *Barb.*, 110.)

VI. The objection that the cause of action is not assignable, goes to the "legal capacity of the plaintiff to sue," and must be specially assigned, under subdiv. 2 of section 144. The cause of action is entirely independent of the plaintiff's title to the cause of action. If the complaint shows "a cause of action" in *Nathan C. Platt*, the difficulty that none is shown in the plaintiff, cannot be removed by a demurrer, under the 6th subd. (11 *How. Pr.*, 216; 3 *Abbotts' Pr.*, 120; 6 *Ib.*, 198; 5 *Duer*, 672; 7 *Abbotts' Pr.*, 315.)

BALCOM, J.—The complaint shows, that prior to the 14th day of May, 1860, the defendant was in possession of and claimed to hold and administer the office of chamberlain of the city and county of New York. That on or about that day, under and in pursuance of the laws of the State of New York, *Nathan C. Platt* was duly appointed to fill such office, and was constituted

thereby the chamberlain of the city and the county of New York, in place of the defendant; and that Nathan C. Platt thereupon duly made and executed the official bond, with the sureties, and took the oath of office required by law; and after that date, and until on and after the 7th day of June, 1860, was entitled to hold and administer the said office, and to receive the fees, emoluments, and commissions appertaining thereto. That the defendant, with notice of the above facts, wrongfully and unlawfully usurped, and continued during the time aforesaid to exercise and perform the duties of said office, and to receive the emoluments, fees, and commissions thereof. That during that time the defendant, as the pretended chamberlain of the city and county of New York, collected and received \$200,000, and paid \$198,000 thereof over to the treasurer of the State; and as such pretended chamberlain retained \$2,000 of said \$200,000, as fees, which belonged to Nathan C. Platt, as chamberlain of said city, who, as such chamberlain, was entitled to collect and receive said \$200,000, and retain \$2,000 thereof, according to law, as his fees, on paying the \$198,000 residue over to the treasurer of the State. That the defendant retained said \$2,000, as fees and commissions, and appropriated the same to his own use; but that in fact the same were retained by the defendant for the use and benefit of Nathan C. Platt as such chamberlain. That said Platt, before the commencement of this action, duly assigned to the plaintiff the above-mentioned claim, demand, or cause of action against the defendant; but that the defendant, though frequently requested to pay said \$2,000, fees and commissions, to the plaintiff, has refused so to do. The plaintiff demanded judgment in his complaint against the defendant for \$2,000, besides interest thereon and costs.

The only ground of demurrer alleged by the defendant is, that the complaint does not state facts sufficient to constitute a cause of action.

If the allegations in the complaint, as to the manner Nathan C. Platt was appointed chamberlain, are so general that the plaintiff could have been required to make them more definite and certain on motion, still they are sufficient to show that Platt was legally appointed to that office; and they are also sufficient, when the objection thereto is taken by demurrer. (See 12 *N. Y.*, 433; 5 *Abbotts' Pr.*, 481.)

The meaning of the complaint is, that the defendant wrongfully claimed to be the chamberlain of the city and county of New York from the 14th day of May, 1860, until the 7th day of June in that year; and as such chamberlain, during that time, improperly received and retained \$2,000, fees and commissions pertaining to that office, which belonged to Nathan C. Platt as chamberlain, and which he was wrongfully prevented from receiving by the defendant; and that the plaintiff has purchased and become the owner of the demand therefor against the defendant, and that the latter refuses to pay the same to the plaintiff.

If Nathan C. Platt had died, the claim or cause of action for the fees and commissions in question would have survived him; and he could therefore assign the same to the plaintiff, and the latter, as assignee thereof, can sustain this action for such fees and commissions in his own name. (See 22 *Barb.*, 110; 12 *N. Y.*, 622.)

It is laid down by Comyn, that "if a man receive the profits of an office upon pretence of a title, an *indebitatus assumpsit* lies by him who has the right to them, as for money had and received to his use." (See 1 *Com. Dig.*, 287, ed. 1824, title, Action upon the case upon assumpsit; 6 *Mees. & W.*, 639; 6 *Term. R.*, 681; 1 *Scott*, 539.) And I do not doubt that an action is maintainable to recover from a party who has wrongfully received the fees of an office, which the plaintiff holds or is entitled to hold, the amount of such fees.

For the foregoing reasons I am of the opinion that the plaintiff's complaint states facts sufficient to constitute a cause of action. The demurrer to the same must therefore be overruled with costs; but the defendant may answer the complaint on payment of the costs occasioned by the demurrer.

VON SCHOENING *a.* BUCHANAN.

New York Superior Court; General Term, May, 1862.

ACTION FOR DELIVERY OF PERSONAL PROPERTY.—PLAINTIFF'S
RIGHT TO COSTS.—AMENDMENT OF VERDICT.

In an action to recover possession of personal property, where the jury find a verdict for the plaintiff, but award no damages for the detention, the court will supply the omission by inserting nominal damages.

Where a jury has rendered a verdict in favor of the plaintiff for the return of personal property, and assessed the value of the property at less than \$50, but has awarded no damages for the detention, the defendant cannot enter judgment for costs until the plaintiff has, by laches, lost his right to correct the judgment.

Appeal from an order setting aside a judgment for irregularity.

This action was brought by Emile Von Schoening against Andrew Buchanan and Thomas Mitchell, to recover personal property alleged to be of the value of \$60. The property was returned to the defendant on the usual undertaking. The jury found a verdict for the plaintiff, and assessed the value of the property at \$40, but failed to find any damages for the detention of the property by the defendants.

The defendants claimed their costs, and had them adjusted by the clerk. After a deduction of the \$40, the value of the property, judgment was entered in defendant's favor for the balance; plaintiff opposing, and claiming that nominal damages should be inserted in the verdict. The court at special term set aside the judgment.

From the order setting aside the judgment the defendants appealed.

William R. Stafford, for the appellants.—I. The defendant, by section 305 of the Code, is entitled to costs as of course in all actions, "unless the plaintiff be entitled to costs therein." The plaintiff in this action cannot recover costs; as the jury gave him no damages, and the property he recovered was val-

Von Schoening *a.* Buchanan.

ued by them at \$40 only, he came within the restrictions as to costs provided by statute to discourage actions of this trifling nature in courts of record. (*Code*, § 304, subd. 4; *Minks v. Wolf*, 8 *How. Pr.*, 238.)

II. This action is not embraced in those specified in subd. 3 of section 304. 1. This is not one of the actions mentioned in section 54 of the *Code*. Courts of justices of the peace have jurisdiction of such actions. (*Code*, § 53.) 2. And the district courts of the city of New York have such jurisdiction of actions to recover personal property where the value does not exceed \$100. (*Laws of 1860*, ch. 131.)

III. It was not imperative on the jury to allow the plaintiff even nominal damages. No special verdict was ordered. The language of the *Code*, that the jury "may" assess damages, leaves the matter entirely in their discretion. (*Code*, § 261.)

IV. The verdict of the jury cannot now be amended, or added to, so as to save the plaintiff from the payment of costs. 1. The jury were properly instructed by the court on the question of damages. Such is the presumption of law, and it is not controverted by the plaintiff. 2. No correction or amendment can be made, unless at the time of the rendition of the verdict, and before the jury separates. (7 *Johns.*, 32.) 3. No motion or application to correct or amend was so made at the time or since, by the plaintiff, and the court has no power of its own motion so to do. 4. Such an application could only be granted on condition of submitting to a new trial, which the plaintiff seems anxious to avoid. (*Corning v. Corning*, 6 *N. Y.*, 97-105; 1 *Code R.*, *N. S.*, 351.)

V. If the verdict did not comprehend the entire issue, then on a proper application the court will not set aside the judgment, but reverse it and order a new trial. (1 *L. Raym.*, 324; 21 *Wend.*, 19, 90; 13 *Ib.*, 425; 6 *Ib.*, 272; 3 *Ib.*, 667.)

Hamilton Reavey, for the respondent.—I. The district (or justices') courts of the city of New York, have no jurisdiction in an action to recover the possession of personal property.

II. It is not the policy of the law, nor was it the intention of the Legislature, to mulct a party in costs double the amount of the value of property converted by a wrongdoer.

III. The jury found that defendants wrongfully took and con-

Van Schoening *v.* Buchanan.

verted the plaintiff's property. He was therefore the prevailing party, and as matter of right he was entitled to nominal damages, and that gives him the right to recover as much costs as damages. (*Code*, §§ 303, 304; *Graham's Pr.*, 278, 282, 580, 581.)

IV. The plaintiff being entitled to costs, the defendant cannot have costs. (*Code*, § 305.)

BY THE COURT.*—BARBOUR, J.—The verdict of the jury in favor of the plaintiff, and assessing the value of the property, necessarily established the fact that the goods were wrongfully detained by the defendants. The plaintiff therefore was entitled to recover at least nominal damages for such detention, and the verdict was incomplete in form, because it contained no such award in terms. (*Bemus v. Beekman*, 3 *Wend.*, 667.) The omission of the jury in this regard would probably have been supplied by the justice before whom the cause was tried, even without a motion, had the matter been brought to his notice at any time before judgment, under the general power of the court to control and perfect its own record and proceedings. Certainly it was the right of the plaintiff to have the record of the verdict so amended in this particular upon motion before the judgment was entered, for the reason that a nominal verdict for damages in his favor would excuse him from the payment of costs to his adversary. (*Code*, § 304, subd. 4; *Ib.*, § 305.) The sole question remaining for consideration, then, is whether the plaintiff has deprived himself of his right to have the verdict amended so as to conform to the real facts found, by his failure to move before the entry of the judgment by his opponent. In regard to that, we are of opinion that inasmuch as the papers used upon the motion show that the defendants' attorney was fully informed of the plaintiff's claim touching the error in the verdict before the judgment was entered, and as the defendants could not have been deprived of any substantial right to which they were equitably entitled by the omission of the plaintiff to move at an earlier day to correct the verdict, no laches can be imputed to the plaintiff of which the defendants can properly complain.

* Present, BOSWORTH, Ch. J., ROBERTSON, WHITE, MONCRIEF, MONELL, and BARBOUR, JJ.

Fassett v. Tallmadge.

The power conferred upon the court by the 173d section of the Code is broad enough to cover this case, and we think the motion was properly granted, in furtherance of justice.

The order should therefore be affirmed with costs.

FASSETT v. TALLMADGE.

*Supreme Court, First District; At Chambers, November, 1860.
Again, General Term, May, 1862.*

CONTEMPT.—DISOBEDIENCE OF JUDGMENT.—FRAUD AS A GROUND
OF ARREST.—EXECUTION AGAINST THE PERSON.

The provision of 2 Rev. Stat., 278. § 8, subd. 3,—which authorizes the court to punish as for a criminal contempt persons guilty of wilful disobedience to a process or order lawfully issued or made,—does not authorize such punishment for non-compliance with a judgment directing the payment of money.

The grantee in a conveyance made in fraud of the grantor's creditors, is not liable, in an action brought to set aside the conveyance, to be arrested, on the ground of fraud in contracting the obligation to enforce which the action is brought (*Code*, § 149, subd. 4), at least where there is no evidence imputing to him actual bad faith.

Where judgment was recovered by the plaintiff in an action to set aside a conveyance, fraudulent as to creditors; and, on the return unsatisfied of an execution against property issued to collect from the grantee in the conveyance, money directed by the judgment to be paid, the plaintiff issued execution against the person without leave of the court,—*Held*, irregular.

Motion for an attachment in a case of contempt.

This action was brought by Elias Fassett against Samuel W. Tallmadge and others, to set aside a conveyance made by a debtor of the plaintiff to Tallmadge, on the ground that it was fraudulent and void as to creditors. The court adjudged the sale to Tallmadge fraudulent and void as against the plaintiff and all other creditors who should come in under the judgment, and directed Tallmadge to pay to a receiver appointed by the court a sum of money for the property so received by him. On

the failure of Tallmadge to pay over to the receiver as directed by the judgment, the plaintiff applied for an attachment, with the view of punishing him for a contempt of court.

William C. Hornfager, for the motion.

Defendant, in person, opposed.

MULLIN, J.—The motion is for an attachment against the defendant Tallmadge, for disobedience of a judgment in this court requiring him to pay over moneys found in his hands, and which ought to be paid over to the receiver.

It is claimed by the plaintiff's counsel that an attachment is, under the Revised Statutes, the proper process against any party who refuses or neglects to obey an order or judgment of the court.

The attachment alluded to is the process which courts are authorized to employ to punish those who are guilty of contemning its authority. It directs the imprisonment of the party, either for a definite term, or until the duty required to be done is performed.

The defendant was made a party to this suit, because it was charged that the other defendants had made to him a fraudulent assignment of their property, in order to reach such property or its proceeds. The fraud has been proved, and that the defendant Tallmadge held a large sum of money which he ought and which he has been required to pay over to the receiver.

Is this a contempt which the court is authorized to punish by imprisonment? It seems to me not; for if it is, then every disobedience of the judgment of the court requiring the payment of money must be also a contempt, without reference to the question whether it does or does not arise out of contract.

The Non-imprisonment Act applies to the Court of Chancery as well as to the courts of common law. And the statutes which prescribe the cases in which parties may be now imprisoned, apply to the court sitting in equity as well as when it is administering the common law.

Accordingly, it is provided by § 285 of the Code of Procedure, that when a judgment requires the payment of money or the delivery of real or personal property, the same can be enforced in those respects by execution as provided in this title. When

it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt.

This section provides a mode of enforcing every judgment. And there is neither reason nor necessity for resorting to attachment while the ordinary process of the court is amply sufficient.

Sections 289 and 290 of the Code regulate the form of the execution.

This defendant is, I presume, liable to be imprisoned on execution in this cause. Fraud is charged and proved, and in such an action the body of the defendant may be arrested and imprisoned. (3 *Rev. Stat.*, 126, § 1, et seq.; *Code*, § 179.)

But before an execution against the body can issue, an execution against the property must be returned unsatisfied in whole or in part. (*Code*, § 288.)

This has not been done, and hence an execution against the body would be irregular.

The only provision of the Revised Statutes relating to contempts, under which it can be claimed an attachment in this case could issue, is subd. 3 of § 8, 3 *Rev. Stat.*, 470, which provides that every court shall have power to punish, as for a criminal contempt, persons guilty of "wilful disobedience of any process or order lawfully issued or made by it."

This case does not fall within this subdivision. In this case it is a judgment, not an order, of the court which has been disobeyed; and as the section of the Code has declared in what cases disobedience of a judgment is a contempt, and this not being one of them, I am quite clear that this motion cannot be granted.

The Court of Chancery moulded its process to meet the necessities of each case. It was not bound down, as the courts now are, by a prescribed statutory form of process, and therefore the decisions of that court afford us no light on this subject.

It is urged that an execution will not meet the exigencies of this case, as the money directed to be paid is not required to be paid to the plaintiff, but to the receiver for third persons.

I am unable to discover how this obviates the necessity of a

Fassett *a.* Tallmadge.

compliance with the statute as to the form of process. All the difficulties suggested can be obviated by notice to the sheriff and the party, and are no more in the way than an assignment to any third person is of a judgment after its rendition.

The motion is denied with \$10 costs.

II. Appeal from an order setting aside an execution against the person.

After this decision of Mr. Justice Mullin, the plaintiff issued execution against the property of Tallmadge, to collect the money directed by the judgment to be paid to the receiver, which was returned unsatisfied; the plaintiff then, without obtaining leave of the court, issued an execution against the person of Tallmadge. The latter execution was set aside on motion by Mr. Justice Clerke. The plaintiff appealed from this order.

Dorman B. Eaton and *W. C. Hornfager*, for the appellant.—

I. This was an action in which the defendant might have been arrested before judgment, and fraud having been found in the judgment, execution against his person was fully authorized without any special order. (*Code*, §§ 179, 181, 288; *Fake a. Edgerton*, 3 *Abbotts' Pr.*, 229.) 1. The Code, uniting law and equity proceedings, has reduced decrees and judgments, precepts and executions, to a common form. (*Code*, §§ 245, 283, 285–289.) 2. It is clear this execution was issued on a “judgment for the payment of money,” and all laws in conflict with the Code are repealed. (*Ib.*, §§ 235, 285, 289.) 3. Indeed, under the chancery proceeding before the Code, a precept was only a form of execution, and was properly called an execution. (*People a. Nevins*, 1 *Hill*, 154, 169; *Van Wezel a. Van Wezel*, 3 *Paige*, 38, 43.) 4. An execution was the proper remedy before the Code under the Revised Statutes. (3 *Rev. Stat.*, 5 ed., 849, 850; *Laws of 1847*, ch. 390, §§ 2, 3.)

II. The execution in this case was issued on a final judgment, not on an order. (*Code*, §§ 245, 400.) It was properly so issued, and the order should be reversed with costs.

Elbridge T. Gerry and *William Curtis Noyes*, for the respondent.—I. There being no judgment in favor of the plaintiff, nor

 Fassett *a.* Tallmadge.

any thing requiring the payment of any money to him (other than his costs which have been collected), there was no warrant or authority for issuing an execution against the person or otherwise.

II. But independently of this, the execution was irregular. 1. There was no preliminary order to arrest before judgment. (*Code*, §§ 178, 179, 181, 288; *Humphrey a. Brown*, 17 *How. Pr.*, 481; *Kendenburg a. Morgan*, 18 *Ib.*, 469; *Stelle a. Palmer*, 11 *Abbotts' Pr.*, 62; *Alden a. Sarson*, 4 *Ib.*, 102; *Mollenaur a. Kœrner*, 13 *Ib.*, 241.) 2. Neither the pleadings nor the judgment disclose any legal ground for issuing it. (*Code*, § 179.) 3. The judgment, as recited in it, is entirely at variance with the judgment itself. 4. It involves an attempt to get money adjudged to be paid to a receiver into the hands of the plaintiff's attorney; in violation of the rule that the attorney in the case must not be the attorney for the receiver. (*Ryckman a. Parkins*, 5 *Paige*, 543; *Matter of Ainsley*, 1 *Edw.*, 576; *Ray a. Macomb*, 2 *Ib.*, 165; *Warren a. Sprague*, 11 *Paige*, 200; *S. C.*, 3 *N. Y. Leg. Obs.*, 122; *Edw. on Receiv.*, 110.) 5. It was issued while an execution against property was outstanding in the sheriff's hands, and unreturned. (2 *Rev. Stat.*, 364, § 6; *Graham's Pr.*, 2 ed., 355.) 6. It was issued as well for the costs adjudged to the plaintiff as for the amount to be paid to the receiver; and this, when an execution against the property for the costs was in the sheriff's hands, upon which the costs have since been collected.

III. The former attempt to discharge the defendant on a habeas corpus was no bar to this motion; and the decision of Justice Mullin on the motion for a precept being at special term, cannot affect the action of this general term, as it is not *res adjudicata*.

Dorman B. Eaton, in reply, contended that the case was clearly within the fourth subdivision of section 179 of the Code.

BY THE COURT.*—INGRAHAM, P. J.—This action was brought to set aside a conveyance made by a debtor of the plaintiff to the defendant Tallmadge, on the ground that it was fraudulent and void as to creditors. The court so deemed it, and ordered

* Present, INGRAHAM, P. J., LEONARD and ROSEKRANS, JJ.

the sale made to Tallmadge to be declared fraudulent and void as against the plaintiff and all other creditors who should come in under said judgment, and the defendant Tallmadge to pay to a receiver appointed by the court a sum of money for the property so received by him.

The judgment also ordered, that the plaintiff should recover against the defendant his costs. An execution was issued against the defendant's property for the costs, which was paid. An execution was also issued for the moneys directed to be paid to the receiver, which was not collected; and an execution against the person was then issued against the defendant, without any order of arrest either before or after the judgment. The defendant has moved to set aside the execution as irregular, which motion was granted at special term, and the plaintiff has appealed.

By section 288 of the Code, an execution can only be issued against the person in one of those cases in which the defendant might have been arrested under sections 179 and 181. None of the subdivisions of section 179 relate to an action in which fraud in contracting the debt or obligation exists, except the fourth, and that applies only to a case where the fraud was committed in contracting the debt or incurring the obligation for which the action is brought. I am at a loss to understand how the defendant can be charged with contracting a debt or incurring an obligation to the plaintiff.

The plaintiff's action rests on a supposed fraud perpetrated by the vendors to the defendant, with intent to defraud the creditors of the vendors. It is not even necessary to maintain such an action, that the vendee should be a party to the fraud knowingly. He may know of sufficient facts to charge him with notice, and yet, as a vendee, be innocent of any actual fraud in making the purchase, and still the court would declare the sale fraudulent. The same thing might occur in the case of an assignment for the benefit of creditors, where the assignment might be entirely free from any actual fraud, and yet the assignment be declared fraudulent and void. To hold that under such circumstances the vendee or assignee is guilty of fraud in contracting an obligation, and therefore liable to arrest, would be at variance with all the provisions of law since the act of 1831 abolishing imprisonment for debt.

When this case was before Mr. Justice Mullin, on a motion for an attachment, he seems to assume that the defendant was liable to arrest. He says, "This defendant is, I presume, liable to be imprisoned on execution in this case. Fraud is charged and proved, and in such an action the body of the defendant may be arrested and imprisoned." For this he cites section 179 of the Code, and 3 Rev. Stat., 126, § 1, being the first section of the act to abolish imprisonment. With the great respect I entertain for the opinions of this learned justice, I have hesitated to dissent from the views thus expressed by him. But I cannot resist the conclusion that he has overlooked a requisite in both statutes referred to which would materially alter the case. The first section of the act to abolish imprisonment, and section 179 of the Code in the fourth subdivision, are expressly confined in their operation to cases of contract, or in which the debt is contracted or an obligation is incurred. Neither of them apply to a case like the present where the action is a proceeding in equity to set aside a conveyance or assignment of personal property.

It seems to me, also, that the learned justice has overlooked the real party who is guilty of the fraud. In ordinary cases of this character the party making the sale or conveyance, and not the party receiving it, is the one who is guilty of fraud.

A reference to the interlocutory judgment will show that it was the sale, and not the act of the defendant Tallmadge, that was declared void. And the final decree recognized as valid, payments made by Tallmadge to the firms who made the sale and to their creditors on account of the property, to the amount of over \$20,000. Can it be that any court can be said in the same judgment to hold that the purchaser of property is a *bona-fide* holder for value, and at the same time that he is a fraudulent purchaser liable to be arrested for the fraud.

I forbear referring to the other questions which have been discussed in this case. It is not material to the decision of this case that we should examine them. If the plaintiff was not satisfied with the decision on the motion for an attachment, he should have appealed. If such attachment was unnecessary, and the compliance with the order could be enforced by execution under section 285, we need only say here that nothing in that section authorizes an execution against the person.

 Johnson *a.* Conger.

Whatever other course the plaintiff may be entitled to take to enforce compliance with the judgment, he has no right to do it by an execution against the person, without any order of the court.

The order appealed from should be affirmed.

*Distinguished
16 Jan 6-15, 6-20
79 N.Y. 165*

 JOHNSON *a.* CONGER.

Supreme Court, First District; General Term, Nov., 1861.

SPECIFIC PERFORMANCE.—COVENANT TO SUBMIT TO ARBITRATION.

A court of equity can compel the specific performance of an absolute covenant to renew a lease at a rent to be fixed by arbitrators.

If the defendant in such case declines to submit to arbitration, the court will fix the rent, or direct a renewal at the former rate.

Appeal from an order granting an injunction.

This action was brought by Jeremiah W. Johnson against Abraham B. Conger and Mary R. Conger, his wife, to obtain the specific performance of a covenant to execute a renewal of a lease.

The plaintiff was the lessee of the premises No. 25 Catharine-street, in the city of New York, under a lease with covenants of renewal, and this action was brought to compel the defendants to execute a renewal lease and for an injunction. One Henry Rutgers, on the 2d day of February, 1818, made a lease of the premises in question to the plaintiff, from the 1st day of February of that year, for 21 years, at a rent of \$100 per year. This term expired on the 1st day of February, 1839. The lease contained covenants for two renewals of 21 years each. The language of the covenant was, that at the expiration of the term to be granted by such renewed lease, as aforesaid, he would grant a "second renewal" of such lease for a further term of 21 years. Henry Rutgers died before the expiration

Johnson *a.* Conger.

of the first term. By his will he devised the income of the premises in question to Catharine Rutgers Hedges, his niece, for life, and after her death he devised the same in fee to her issue. On the 25th day of May, 1831, Catharine R. Hedges died, leaving two children, Mary Rutgers McCrea Hedges and Catharine Ann Hedges. On the 26th day of July, 1831, their father, Timothy Hedges, was appointed their guardian, who, under an order of the then Court of Chancery, executed a renewal lease of the said premises for 21 years, at a rent of \$325 per annum, with a covenant for a further renewal of 21 years. In the month of November, 1836, Abraham B. Conger married Mary Rutgers McCrea Hedges. The infants came of age in the year 1846, and Catharine Ann Hedges conveyed her undivided half of the premises in question to Mrs. Conger, subject to the covenants in the said lease. The last lease contained a covenant for such rent under the last renewal, "as should be agreed upon by them respectively: but in the event of their not agreeing upon such rent, each party shall choose a disinterested person to ascertain the same." Plaintiff averred his readiness to agree or to arbitrate the said rent, but that defendants refused either to agree upon a rent, or to arbitrate, or to grant a further renewal of the lease, and prayed that a decree may be made that the defendants specifically perform the covenant in said lease contained.

The defendants answered, 1. That they have no knowledge that the plaintiff was ready or willing to agree with the defendants as to the rent.

2. That if plaintiff was ready or willing to arbitrate the rent, he did not make it known before the expiration of the lease.

3. That no such offers as were alleged in the complaint were made until the 23d of February, 1860.

4. That because no election was made before the expiration of the lease for a renewal, the defendants claim that they were not bound to renew it.

5. That they did not refuse to grant a renewal or to arbitrate the rent, until after the expiration of the lease.

An injunction was granted to the plaintiff, defendants opposing, by the court below, August 22, 1860, from which the defendants appealed.

Lucien Birdseye, for the appellants.—I. By the language of the lease, the covenant for the renewal is binding only on the lessors, and not upon the lessees. The covenant for renewal is, therefore, a covenant by the lessor to renew at the option of the lessee.

II. In such case the action will not lie, and the right of action is not created until the party who is to exercise the option has exercised the option and given notice thereof to the other party. The rule on this subject is this. If the matter to be alleged in the pleading, and on which the right of action depends, be more properly within the knowledge of the plaintiff than of defendant, the declaration must state that the defendant had notice thereof. (1 *Step. N. P.*, 380.) Or again, where the matter is in the privity and knowledge of the plaintiff alone (as is the case here), there must be an averment of notice. (*Holmes a. Twist*, *Hob.*, 51, in the Exch. Ch., on error from K. B.) Or again, if a condition be to do a thing on the performance of an act by the feoffee or obligee, which is secret and lies only in his breast, the obligee must give notice thereof. (See 3 *Comy. Dig.*, tit. *Condition*, l. 8, and cases there cited. Particularly these, viz., *Hall a. Hemmings*, *Cro. Jac.*, 432 (1 *Roll. Abr.*, 263); *Holmes a. Twist*, *Hob.*, 51; 5 *Co.*, 23, b. See, also, *Douglass a. Howland*, 24 *Wend.*, 35, 49, per COWEN, J.; *Clough a. Hoffman*, 5 *Ib.*, 499; *Sage a. Hazard*, 6 *Barb.*, 179; *Vyse a. Wakefield*, 6 *M. & W.*, 442 (8 *Dow. Pl.*, 377, and 4 *Jur.*, 509); S. C., 7 *M. & W.*, affirmed on error.)

III. In the present case such notice must be given prior to the expiration of the term created by the former lease, so that "at the expiration" of that term the new lease may take effect.

IV. But even if the notice of the election to take the new lease were given in due time, the present action cannot be maintained; for it is merely a suit to compel the defendants to perform specifically an agreement to submit to arbitration. Such a suit a court of equity will not entertain. (*Greason a. Keteltas*, 17 *N. Y.*, 491, 496, and cases cited.)

V. The injunction should not have been granted. It being merely to restrain defendants from taking summary proceedings to recover their property, and there being no allegation of fraud on the part of the defendants. (*Hyatt a. Burr*, 8 *How.*

Johnson *a.* Conger.

Pr., 168. See cases collected in *Voorhies' Code*, 5 ed., 262, note *E.*)

VI. The present action cannot be maintained to recover damages for a breach of the covenant to grant a new lease; for no breach of that covenant is averred.

James R. Whiting, for the respondent.—By the terms of the covenant the tenant is entitled to the renewed lease.

II. The covenant is not void for the want of mutuality—even were it so in fact. A covenant by one party to do an act founded upon a good consideration is binding upon the other, although there be no mutuality.

III. In this case the covenants are, by their very language, mutual. The parties bind themselves “mutually,” the lessor to give and the lessee to take the lease.

IV. No notice was necessary by the tenant—he had the right to take—and if the lessor wanted more rent it was his business to take the necessary steps for the ascertainment of the rent.

V. The mode of ascertaining the rent was provided for by the covenant. *Non constat* the tenant was dissatisfied with the old rent. If the lessor wanted more it was his duty to demand it; and if the tenant refused to pay it, then to arbitrate, as provided in the covenant.

VI. The idea of option and notice, contended for by the appellants, and the law founded upon it, have no application in this case.

VII. The contract to arbitrate the amount of rent is valid, and will be enforced in a court of equity. Such a covenant is not a covenant to arbitrate as to a right, but as to a mode of compensation for a conceded right. The cases which establish the doctrine that courts will not compel an arbitration, are all cases where questions of law may be involved. Here there is none. This principle is well settled. (*Avery a. Scott*, 20 *Eng. L. & Eq.*, 327; *Goldstone a. Osborne*, 2 *C. & P.*, 549.)

VIII. The case of *Greason a. Keteltas* (17 *N. Y.*, 491) concedes the remedy we have adopted as the proper one.

IX. The renewal should be decreed under the circumstances; and if the defendants will not agree to an arbitration, they should be ordered to renew the lease at the same rent reserved in the last lease.

Lansing *a.* Stone.

BY THE COURT.*—INGRAHAM, P. J.—We are of the opinion that the lease compels a renewal, and that one party is bound to give and the other to accept such renewal. The rent, if changed, is to be fixed by arbitrators chosen by the parties, and no notice was necessary from the lessee before the expiration of the lease.

We think a court of equity can compel the parties to perform this covenant of renewal. If the landlord declines to name an arbitrator on his part, the same can be ascertained by the court, or the lease renewed at the old rent.

What was said in *Greason v. Keteltas* (17 *N. Y.*, 491) was not necessary to the decision of that case, and can hardly be considered as conclusive in this case.

This case also differs from the one cited, in that the obligation here to renew is absolute; in the other it was at the option of the lessee.

The order appealed from should be affirmed.

LANSING *a.* STONE.

Supreme Court, First District; General Term, Jan., 1862.

COMMON LAW IN THIS STATE.—EVIDENCE.—ADMISSIONS.—PRESUMPTION OF ORDINARY CARE.

It seems, that the English statute (6 Anne, ch. 3: re-enacted, 14 George III.) which provides that no action, suit, or process shall be had against any person in whose building or on whose estate any fire shall accidentally begin, for any damage thereby,—is in force in this State as part of the common law brought with them by the colonists.

In an action by a tenant against his landlord for damages to the furniture of the former, by negligently setting the leased premises on fire, evidence on behalf of the tenant that the landlord had obtained a policy of insurance on the premises, and received the amount mentioned therein is properly rejected.

In regard to the performance of a lawful act, the presumption exists that at least ordinary care was used.

Declarations out of court are not to be construed as admissions, by the speaker, of any thing not within the popular meaning of the language employed.

* Present, INGRAHAM, P. J., CLERKE and SUTHERLAND, JJ.

Lansing a. Stone.

In an action to recover damages for loss of personal property by a fire, the evidence was that the defendant, shortly before the fire broke out, rightfully went into a chamber of the house where the property was with a lighted candle, and that the defendant had stated that he thought the house must have taken fire from the candle, the circumstances showing that the fire might have had a different origin,—*Held*, that the verdict was against evidence.

Appeal from a decision of the Madison County Court affirming a justice's judgment.

This action was brought before a justice of the peace, where the plaintiff, George W. Lansing, complained of the defendant, Daniel D. Stone, that he rented a house of the defendant, in the year 1858, in the town of Cazenovia, and placed his household furniture in it; that the defendant afterwards entered the house in the absence of the plaintiff and his family, and through the negligence and carelessness of the defendant the house took fire and plaintiff's furniture therein was burned to his damage, &c. The defendant's answer was a denial of each and every allegation in the complaint.

The action was tried before the justice without a jury.

The proof showed that the defendant owned about ninety acres of land, on which the house was situated. That the plaintiff hired the house of the defendant for one year from April 1, 1858; that the house and some of plaintiff's furniture, which was not got out, were burned in the daytime in August, 1858, when the plaintiff and his family were all absent. The defendant cultivated the ninety acres of land, and kept some things in the chamber over the wing or wood-house, and went into the chamber "once in a while" to the knowledge of the plaintiff and without objection. The plaintiff testified that the defendant did not reserve the chamber, but had the privilege of leaving some irons there. The defendant testified that by the contract of leasing he was to have the privilege of keeping things in the chamber, and kept things there, such as ox-bows, staples, and other things. The plaintiff testified that the defendant said, "it was all his doings the house burning; that he had been into the chamber in the daytime previous with a lighted candle." Palmer Freeborn testified that defendant said "he had been up in the chamber to look for an iron of some description, and that he had a candle there, and that he thought it (the house) must

Lansing a. Stone.

have taken fire from the candle." Gordon Barnard testified that defendant said "he must have set it (the house) afire from his candle; that he went into the chamber with a lighted candle, and he thought it (the fire) must have taken from that." The defendant testified that he had been in the habit of going into the chamber with a lighted candle after such things as he kept there, and kept a candle there to light and go in with. That on the day of the fire, soon after the plaintiff went away, at about 10 A. M., he went into the chamber with a lighted candle to get a part of a staple to an ox-yoke. That he first sent his son for it, and he came back without it. Defendant testified in substance that he was careful so as not to set any thing on fire with the candle and put it out when he left. That he was from 80 to 100 rods from the house on the farm when he first saw the house was on fire. That the smoke was then coming out of the roof of the upright part of the house. That he and his son ran for the house, got water, and went into the chamber where he had been with the candle, and "there was no fire there." That there was fire in the garret. Defendant's son was not sworn on the trial. Walter Ainsworth testified that when he first saw the fire, it was pretty much over the roof of the upright part, and that "the roof over the wing was not on fire any." The defendant got some of the plaintiff's furniture out of the house, and tried as hard as he could to get the whole of it out and to put out the fire. The plaintiff testified he had a fire in the house in the morning before he and his family left the same the day it was burned; but he supposed his fire went down while he and his family were eating breakfast, and also supposed it was not built up again. The plaintiff asked the defendant if he had not previously had the house insured, which the justice excluded as immaterial. The plaintiff offered to prove that subsequently to the fire the defendant received the insurance, which was also excluded by the justice. The justice rendered a judgment against the defendant for \$40 damages, besides costs, which was affirmed by the Madison County Court. The defendant appealed from the judgment of the latter court to this court.

D. W. Cameron, for the appellant.

H. C. & R. L. Miner, for the respondent.

Lansing *a.* Stone.

BY THE COURT.*—BALCOM, P. J.—It is proper in this case to refer to the law touching the liability of a person for damage a fire does to the building or other property of another, that accidentally begins in his own house or other building. I mean a fire that happens by reason of the negligence of the owner of the house or other building in which it begins, or the negligence of his servant, and burns the house or other property of a neighbor. Blackstone stated the law, in his time, as follows: "If a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master; because this negligence happened in his service; otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service, and must answer the damage personally. But now the common law is, in the former case, altered by statute (6 *Anne*, 3), which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness." (1 *Black. Com.*, 431.) The above-mentioned act was re-enacted by statute (14 *Geo. III.*), which provided that "no action, suit, or process whatever shall be had against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall, after the 24th day of June, 1774, accidentally begin; nor shall any recompense be made by such person for any damage thereby, any law, usage, or custom to the contrary notwithstanding." I think the statute of *Anne*, above mentioned, as altered by that of 14 *Geo. III.*, I have quoted, is a part of the common law of this State, notwithstanding the remarks *arguendo* of Judge Denio in *Althorf v. Wolf* (22 *N. Y.*, 366). In *Bogardus v. Trinity Church* (4 *Paige*, 178), Chancellor Walworth said: "The common law of the mother country as modified by positive enactments, together with the statute laws which were in force at the time of the emigration of the colonists, became in fact the common law, rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York by common consent, because it was applicable to the colonists in their new situation,

* Present, BALCOM, P. J., CAMPBELL and PARKER, JJ.

and not by legislative enactment, became a part of the common law of the province." Chancellor Kent says: "It is also the established doctrine, that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country." (1 *Kent's Com.*, 4 ed., 472; see 19 *N. Y.*, 73.) By section 17 of article 1 of the existing Constitution of the State, such parts of the common law, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, one thousand seven hundred and seventy-five, are in force, which have not since expired, or been repealed or altered. A similar provision was contained in our State Constitutions of 1777 and 1821. The statute (14 *Geo. III.*) I have quoted, was in force in the colony of New York on the 19th day of April, 1775, and it has not since expired, or been repealed or altered; for it was a part of the common law of said colony, and therefore is now a part of the common law of the State. I think no repealing act of our Legislature, not even that passed December 10, 1828 (2 *Rev. Stat.*, 779), is applicable to English or colonial statutes which were a part of the common law of the colony of New York. This conclusion is sustained by the opinions of Chancellors Walworth and Kent which I have quoted.

I have said this much to show that if a man's house or other building takes fire by reason of his own or his servant's negligence, he is not liable for the damage the fire does by spreading and burning his neighbor's house or other property. The interest the owner of houses and other buildings has in preserving them from destruction by fire, is probably the only guaranty his neighbors have against his own or his servant's negligence in the use of that dangerous element in his own houses and other buildings. A man's loss by a fire that accidentally begins in his own house or other building and burns it, according to Blackstone, is sufficient punishment for his own or his servant's carelessness, without making him pay the damage such fire does to the property of others. And his opinion clearly is, if such a fire be caused by negligence it is to be deemed accidental.

The defendant in this case had as great an interest in preserving his house from destruction by fire as the plaintiff had in taking care of his household furniture so it would not be burned.

Lansing *v.* Stone.

If the plaintiff had been permitted to prove, as he offered to, that the defendant had the house insured before it was burned, and that he afterwards received the insurance money, the evidence would not have materially changed the case. The offer was not to prove an over-insurance; and the plaintiff did not allege or claim that the house was intentionally set on fire by the defendant. But as the offer was rejected, its character or that it was made at all is of no importance.

It cannot be said that the defendant wrongfully went into the chamber with the candle. The complaint did not charge him with wrongfully entering the house or chamber, or with wrongfully going into the latter with a lighted candle. And I think the plaintiff's own evidence shows the defendant had at least an implied license to go into the chamber with a lighted candle at any time after things he kept there. There can be no presumption that he did not exercise ordinary care when he went into the chamber with the lighted candle the day the house was burned; for ordinary care is that amount of attention or diligence which men of common prudence generally bestow in the care and use of their own property or in transacting their own business; and the presumption, without proof to the contrary, is that he was thus careful.

The declarations of the defendant, to the effect that the burning of the house and furniture was all his doing, that he had been into the chamber with a lighted candle just previous to the fire, and that he thought the house must have taken fire from the candle, if there was no evidence to weaken their force, would not prove he was negligent or careless in the use of the candle. They only show that the fire was accidental, or, at most, that it might have been caused by the careless manner the defendant used the candle,—not that it was so caused. But the force of those declarations was greatly weakened, if not entirely overcome, by the evidence of the defendant and of Ainsworth. Their statements are uncontradicted, that the fire was pretty much over the roof of the upright part of the house before the roof on the wing was on fire at all: and the defendant swore positively that he was careful with the candle; and also that after the upright part of the house was on fire he went into the chamber where he had been with the candle, and "there was no fire there." Besides, the plaintiff testified he had a fire

Lansing a. Stone.

in the house in the morning before he and his family left the same, the day it was burned, though he supposed his fire went down while he and his family were eating breakfast, and also supposed it was not built up again. It seems to me the evidence, when all considered together, wholly failed to show the fire was caused by the carelessness or negligence of the defendant.

But I think the plaintiff could not recover, by reason of the common law that exempts a person from liability for damage caused by a fire that accidentally begins in his own house or other building through the carelessness or negligence of himself or his servant, and burns the house or other property of his neighbor, without showing that the fire was caused by the wilful act of the defendant, or that he wrongfully entered the house or chamber with a lighted candle.

Suppose it were clear that the fire in question originated from that kept in the house by the plaintiff, I think the defendant could not recover the value of the house, in an action against him, unless he could show that the plaintiff intentionally left his fire so it would burn the house: for tenants were relieved from the liability the ancient common law imposed on them for the consequence of fires that accidentally begin in houses rented and occupied by them, by statute, 6 Anne, ch. 31, § 67 (made perpetual by 10 Anne, ch. 14), which provides "that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin;" and more recently by the statute of 14 Geo. III., ch. 78, by which it is enacted, that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby. They can, however, make covenants that will oblige them to rebuild the buildings demised to them, if they are destroyed by fire during the continuance of their leases. (See *Woodf. Landl. & Ten.*, by Harrison, 434; *Archb. Landl. & Ten.*, Law Library, 4th series, vol. 28, 192; 2 *Platt on Leases*, 187.) And as those statutes modified the common law of Great Britain, they became a part of the common law of the colony of New York, and are now a part of the common law of the State. (See authorities touching this question, cited *supra*.) But this question and

Danvers *a.* Dorrity.

some others I have discussed need not be definitely passed upon in this case.

My conclusion is that the defendant rightfully went into the chamber with a lighted candle; and that the plaintiff did not show he was negligent in using the candle at the time he went into the chamber with it: in other words, I think the evidence, when all considered together, does not establish a cause of action against the defendant. The judgment of the justice was therefore against evidence and law; and the County Court should have reversed it, instead of affirming it. It follows that this court should reverse the judgment of the County Court and that of the justice, with costs.

Judgment reversed.

DANVERS *a.* DORRITY.

Supreme Court, First District; Special Term, January, 1862.

PARTITION.—PLEA IN ABATEMENT.

The right of one of several joint-owners to a partition of undivided real property is not absolute.

No one has the right to make another a party to an action when the same controversy is in course of settlement in another court.

Where, in an action for the partition of real property owned by partners in joint tenancy, it appeared on the trial that the action had been commenced during the pendency of an action brought by the defendant in another court for a dissolution of partnership and an accounting, which involved the real property in question;—*Held*, that the complaint must be dismissed.

Trial by the court.

This was an action for the partition of certain real estate situated in the city of New York, owned jointly by the plaintiff and defendants. The answer set up that the property in question was owned by the parties to the action as tenants in common. That the parties were partners in trade, and had carried on business on the premises in question, and that the property sought to be partitioned had been owned by them as such co-

partners. That in April, 1856, the partnership was dissolved by the retirement of one of the defendants therefrom. That in February, 1858, the defendant Dorrity commenced an action in the Superior Court against the plaintiff and the defendant Russell, demanding judgment that the defendants be decreed to render an account of the stock, fixtures, machinery, and effects, and that the plaintiff's interest be adjusted and stated, and that he have judgment for the amount of his interest therein, or that a receiver be appointed to take and sell the property and distribute it among the partners according to their respective interests; and that the action in the Superior Court was still pending and undetermined.

On the trial the defendants proved the pendency of the action in the Superior Court and rested. The plaintiff thereupon introduced evidence that there was nothing due or owing from the late firm at the time of the commencement of this action so set forth in the answer, or at any subsequent time.

William W. Niles, for the defendants, contended that the matter pleaded and proven was matter in abatement of the action. That it showed a former action commenced by one of the defendants against the plaintiff and his co-defendant in this action, in which the whole matter in controversy in this action might be disposed of, and that it was not competent for the plaintiff to bring this action while that was pending and undisposed of.

I. T. Williams, for the plaintiff.—I. The answer is bad as a plea in abatement: to abate one suit by showing the pendency of another, it was necessary to prove that the plaintiff in the action had, before the commencement thereof, commenced still another action against the defendant therein, for the same identical cause of action.

II. Where suits are brought, involving the same transaction, but the plaintiff in one is defendant in the other, and the defendant in the one is plaintiff in the other, the party who first brings his action to trial may proceed with the trial thereof, although the other action may have been first commenced, and if successful in the action may thereafter, by a supplemental answer, plead the adjudication in such action in bar of such other action.

III. It is not competent for a party to prevent his adversary from suing him, by first suing his adversary. If a party have a cause of action, he may bring an action thereon, and bring it to trial, as an absolute right, not subject to being defeated by the fact that his adversary had before the commencement of it, brought a similar action against him. (*Naylor a. Schenck*, 3 *E. D. Smith*, 135; *Swan a. Bean*, referred to in 3 *E. D. Smith*, 158; *Lightbody a. Potter*, 10 *Wend.*, 534; *Bushnell a. Brown*, 2 *Burr.*, 1229; *Evans a. Prosser*, 3 *Term.*, 186; 1 *Watts and Serg.*, 57; 1 *Ashmead*, 7.)

IV. The pleadings in the suit here pleaded in abatement show no case for the equitable or legal interposition of the court. 1. There is no expulsion of the plaintiff, or unjust interference with his legal rights, charged or set forth and charged in that action. 2. No insolvency or wrongful act on the part of the defendants is alleged or charged. 3. No debts are alleged to exist, but on the other hand it is virtually admitted in the complaint that there are none. 4. The complaint in that action does not allege that either of the members of the firm, or the firm itself, is indebted to the plaintiff. No waste or destruction of property is alleged. It is not alleged that the defendants are preventing the plaintiff from taking possession of any thing which he has a legal right to take possession of. No contract is alleged to be broken. No wrongful act is alleged to be done.

V. The right of partition is the absolute right of one of several owners of real estate, subject to be defeated for good and legal cause, but that it lies upon the defendants to affirmatively establish such a defence.

CLERKE, J.—The right to a partition of undivided real estate is not, I conceive, absolute. The relations of the joint-owners towards each other may be such that it would be exceedingly unjust to grant to any one owner such a right,—unjust not only to the other owners, but productive of injustice to creditors of other owners. Besides, no man has a right to make another a party to an action when the controversy is in a course of settlement in another court.

This is precisely the position of affairs between the parties to this action. The real estate sought to be divided constituted a part of the capital of the copartnership which existed between

Matthews *a.* The Mayor, &c., of New York.

them, and although it has not been positively proved that there are any liabilities of the firm remaining due, yet it would not be safe to take the testimony of any one witness upon that point as conclusive. Nothing but a final accounting can be satisfactory on that point, or on the question of the claims of the respective parties.

The action pending in the Superior Court involves the property now sought to be divided, and until that action is terminated, it would not be proper to entertain any suit for the partition of it. The commencement of this action was totally unnecessary.

The complaint should be dismissed as to all the defendants, but with costs only in favor of Dorrity.

MATTHEWS *a.* THE MAYOR, &c., OF NEW YORK.

*Supreme Court, First District; Special Term, February, 1860.
Again, At General Term, January, 1862.*

IRREGULARITY IN SALE FOR ASSESSMENT.—RELIEF BY COURT OF EQUITY.—INJUNCTION.—WANT OF FINDINGS OF FACT IN CASE ON APPEAL.

When a lease, made by a municipal corporation pursuant to a sale for an unpaid assessment, is, by law, evidence of the regularity of the sale, the court in cases of substantial irregularity will restrain the making of such lease.

On appeal from judgments in actions tried by the court, if the case contain no findings of fact, it is the practice of the general term of the first district to dismiss the appeal, unless the parties consent, before the appeal is submitted, to have the case sent back for correction.

I.—Trial by the court.

This was an action, by Alexander Matthews against The Mayor, &c., of New York, George A. Hoyt, Stephen J. Field, David Dudley Field, and Harriet D. Field, brought to restrain the Corporation from executing leases of four lots on 26th street,

Matthews *v.* The Mayor, &c., of New York.

in the city of New York, which had been sold for assessments, on three grounds: 1. That the assessments themselves were irregular and illegal. 2. That the proceedings to enforce them had also been irregular and illegal. 3. That since the sale the Corporation had sold the same lots for subsequent assessments to the landlord of the plaintiff. A demurrer was first interposed by the Corporation upon the ground that the court had no jurisdiction to grant relief. The demurrer was overruled by Mr. Justice Davies. An answer was then put in, and the case tried before Mr. Justice Mullin.

It appeared upon the trial that the plaintiff was the lessee from the defendants Field of one of the lots in question. That the defendants Field were the owners in fee of the four lots. That the Corporation had, in 1844, executed to the defendant D. D. Field a lease of these lots for seventy years for the unpaid taxes of 1837, 1838, 1839, and 1840. That the four lots were sold in one parcel, in June, 1856, by the Mayor, &c., of New York, to satisfy two assessments for local improvements, one for the opening of Twenty-sixth-street, and the other for setting curb and gutter in the Eighth Avenue. It appeared that the assessments were confirmed in 1838.

Upon the evidence which was adduced in regard to the proceedings taken by the Corporation in laying the assessments and conducting the sale, the following irregularities were claimed by the plaintiff as established. With regard to the opening of 26th street: 1. That there was no ordinance or resolution authorizing the opening. The one proved was passed in March, 1838, nearly two years after the petition presented to the Supreme Court for the opening. The signature of the mayor to the petition was not enough. The statute required that the "Mayor, Aldermen, and Commonalty, in Common Council convened," should act upon the matter and direct the opening. 2. The petition to the Supreme Court and its order related to the opening of 26th street, from the Fourth Avenue to the Hudson river. The report and subsequent proceedings related to the opening of the street from the Bloomingdale Road to the Hudson river, and that there was, therefore, no application to the Supreme Court, and no order of that court for the assessment which was actually made. 3. It did not appear by the report of the commissioners, that they gave notice of presenting it to

Matthews a. The Mayor, &c., of New York.

the court in more than one newspaper. 4. The report of the commissioners did not set forth the names of the owners of the property, or declare that the owners were unknown. 5. The land taken and the land assessed belonged to the same owners. For taking their own land the owners were assessed \$386.

With regard to the Eighth Avenue assessment, the plaintiff objected that there did not appear to have been any ordinance or resolution of the Common Council authorizing it.

With regard to the proceedings to collect the assessment the plaintiff claimed: 1. That there was no warrant to the collector to collect and receive the assessment. 2. That the affidavits of the collectors as to demand upon the owners were defective. 3. That though the lots were occupied at the time, no notice was left with the occupants. 4. That the notice of sale was defective, (1) in giving the date of confirmation of the 26th street assessment incorrectly; (2) in giving an erroneous description of the lots; and 5. That five lots were sold together for two assessments, while one of the assessments covered but three lots.

David Dudley Field, for the plaintiff.

Rufus F. Andrews, for the defendants.

MULLIN, J.—It was conceded on the argument that the proceedings of the city officers in the proceedings to open 26th street, and to assess the tax for the curb and gutter in front of the lots in question, and in selling the said lots for the charges thus imposed on the owner, were irregular, and I am relieved, therefore, from any further examination of that question. The concession, I think, was very properly made, as it seemed to me quite clear that but very little attention, if any, had been paid by the Common Council and its subordinates to the statutes regulating proceedings in cases of opening streets, and laying assessments for the local improvements for which the lots in question were sold. But it is insisted by the defendant's counsel that a court of equity has not jurisdiction to review the proceedings of these inferior jurisdictions, and to set them aside, if irregular, except in two classes of cases. The one is when the lease becomes conclusive evidence of the regularity of the sale. (1 *Rev. Stat.*, 5 ed., 969, § 69.)

Many of the most serious defects in this case, are in the pro-

Matthews *a. The Mayor, &c., of New York.*

ceedings to sell, and in the sale itself. The affidavit of the collector is defective in several particulars; the notices required to be given to owners or occupants appear not to have been given. The assessments on some of the lots sold had been paid before the sale; yet these lots were sold notwithstanding. It would seem to be quite oppressive to permit a lease to be given, which, when given, is conclusive of the regularity of the sale, when there is no pretence that the sale was regular—not in mere matters of form, but in substance; in matters vitally important to the owner or occupant of the land.

This case is not one in which the Corporation when prosecuted, or when prosecuting for the possession of the premises in question, will be bound to prove the proceedings to sell, and the sale itself regular, but the lease becomes conclusive evidence of the regularity—and the owner or occupant, however irregular the proceedings may have been, cannot even assail them—his lips are forever closed on that subject. The cases to which I am referred, which deny jurisdiction in the court to restrain the acts of municipal corporations, are those in which the Corporation, after having gone through with the whole proceedings in assessing and selling real estate, are yet bound to prove such proceedings regular; cases in which they have the benefit of no presumption, and of course, when the injured party has ample protection. (*Heywood a. City of Buffalo*, 14 *N. Y.*, 534; *Wiggin a. Mayor, &c., of N. Y.*, 9 *Paige*, 16; *Van Doren a. the same, Ib.*, 388; *Mayor, &c., of Brooklyn a. Meserole*, 26 *Wend.*, 132.)

Within the cases cited, the lease, if given pursuant to the sale, casts a cloud on the plaintiff's title, and for this reason the court has power to restrain the Corporation from making or delivering such lease.

I must order judgment that the defendant be perpetually enjoined from making lease of the premises described in the complaint, and that the other defendants be also perpetually enjoined from receiving such lease.

II.—Appeal from a judgment.

From the judgment entered upon the foregoing decision, the defendants, *The Mayor, &c., of New York*, appealed.

Matthews v. The Mayor, &c., of New York.

Rufus F. Andrews and *Abraham R. Lawrence, Jr.*, for the appellants.—I. The respondent shows no cause of action for an injunction. 1. The respondent avers that the two assessments were void. If he is correct, the lease to Hoyt would be a nullity. When a party claims title to or an interest in lands, under a lien or assessment sale, he is bound to show that every single step has been taken which the law prescribes; and if he fails to do so, he cannot obtain possession of the lands or of any interest therein. (*Striker v. Kelly*, 2 *Den.*, 323; *Doughty v. Hope*, 3 *Ib.*, 594; 1 *N. Y.*, 79; *Sharp v. Speir*, 4 *Hill*, 76; *Sharp v. Johnson*, *Id.*, 92; *Leggett v. Rogers*, 9 *Barb.*, 406; and cases cited.) Mr. Hoyt will be obliged to resort to an action of ejectment, in which it will be incumbent on him to prove a strict compliance with every provision of the statute under which the sale was made. (*Sharp v. Johnson*, 4 *Hill*, 92, and cases *supra*.) 2. The notices to which the complaint refers are those prescribed by the 10th section of the act of 1839. (*Davies' Laws*, 820.) The service of such notice is necessary to confer upon the Corporation the power to sell the assessed premises. The neglect to make such service nullifies the whole proceeding, and the case is brought, therefore, precisely within the doctrine laid down in the cases above cited. 3. The provision of the act of 1816, § 2, that "the lease shall be conclusive evidence that the sale was regular" (*Davies' Laws*, 600), does not affect the case. That provision only refers to the regularity of the proceedings at the sale, or immediately preceding such sale. (*Striker v. Kelly*, 2 *Den.*, 323.) 4. The decision is put partly upon the ground that there was a defect in the affidavit of the collector. If this is so, the defect is jurisdictional, and the case is brought in exact point with *Striker v. Kelly*, *supra*. 5. The case of *Scott v. Onderdonk* (14 *N. Y.*, 9) does not affect this case, because in that case it appears that the Brooklyn assessment statute makes the execution of the lease *prima-facie* evidence of the validity of the assessment. 6. This is not a proceeding under ch. 338 of the Laws of 1858, and the provisions of that act have no bearing in this case.

II. The allegation that the date of the confirmation of the assessment for the opening of 26th street was erroneously described in the notice of sale does not avail the respondent, inasmuch as it does not appear that he was in any way aggrieved.

Matthews *a.* The Mayor, &c., of New York.

David Dudley Field, for the respondent.—I. Since there are no findings of fact, the court must presume that the facts justified the legal conclusions of the special term. (*Viele a. Troy & Boston R. R. Co.*, 20 *N. Y.*, 186; *Carman a. Pultz*, 21 *Ib.*, 547; *Grant a. Morse*, 22 *Ib.*, 323.)

II. The assessment for opening 26th street was illegal and void for the reasons urged in the court below. (*Davies' Laws*, 528, 529, 532, 537; *Platt a. Stewart*, 8 *Barb.*, 493.)

III. The Eighth Avenue assessment was illegal and void. (*Davies' Laws*, 526, § 175.)

IV. The proceedings to collect both assessments were irregular and illegal. (*Davies' Laws*, 598, § 1; *Ib.*, 599; *Ib.*, 820, § 10.)

V. The court had jurisdiction to vacate these assessments and subsequent proceedings, and to restrain the giving of leases. 1. Such was the law before the statute of 1858, because the giving of leases would have created conclusive evidence of the regularity of the proceedings, contrary to the fact. (*Davies' Laws*, 600; *Scott a. Onderdonk*, 14 *N. Y.*, 9.) 2. The act of 1858 would have given jurisdiction if there had been none before. (*Laws of 1858*, ch. 538.) This act does not specify the manner in which the assessments are to be attached and set aside. It only provides that the party aggrieved may apply to a judge of the Supreme Court. A complaint is an application. (*Morgan a. N. Y. & Albany R. R.*, 10 *Paige*, 290.)

VI. There was also another and independent ground of interference, and that was the fact that the Corporation had afterwards sold the same property for taxes subsequently laid, and given a conveyance to the landlord of the plaintiff. It would, therefore, be most inequitable for the Corporation to grant another lease, covering, in part, the same period of time, and tending to destroy the title which they had given. A court of equity will not allow a vendor or lessor thus to embarrass his vendee or lessee.

BY THE COURT.*—CLERKE, J.—We regret that this case is not in a condition in which it can be decided. There are no findings of fact by the justice who tried the cause at special term. This is an omission which we very frequently discover in cases

* Present, CLERKE, SUTHERLAND, and MULLIN, JJ.

Ferner *a.* Williams.

presented at the general term. For the future, when this defect appears, we shall be under the necessity of dismissing the appeal, unless the parties consent, before it is submitted, to have it sent back for correction.

On the present occasion we send the case back for correction, leaving it to be heard in its proper place at the next general term, on payment of costs of the November term by the appellant.

SUTHERLAND, J.—I concur in the within, because, strictly speaking, there should have been a finding of facts; but as no finding of facts could probably have changed or affected the only question in the case, I should have been willing to dispose of the case on the case as it is. The act of 1858 cannot avail the plaintiff. The only question is, whether the lease, if executed to Hoyt, will be conclusive evidence that all the previous proceedings have been regular, &c.

Case sent back for correction.

FERNER *a.* WILLIAMS.

Supreme Court, First District; General Term, January, 1862.

PLEADING CONDITION PRECEDENT.—DUE PERFORMANCE.

To charge the indorser upon a note payable at a particular place, the complaint must contain an averment to the effect that payment was demanded at such place.

The conditions of liability upon negotiable paper are within the cases provided for in section 162 of the Code.

In an action against the indorser of a promissory note payable at a particular place, the complaint averred that at maturity the note was duly presented for payment to the makers;—*Held*, a sufficient averment of presentment at the place named.

Appeal from an order sustaining a demurrer.

This action was brought by Simon Ferner and Hymes Kraushaar against Alfred L. Williams, upon two promissory notes

Ferner *a. Williams.*

of R. H. Gibson & Co., indorsed by Williams. These notes were by their terms payable at the office of the makers, 94 Woodward Avenue, Detroit. After setting out the making of the notes, and describing but giving no copy of them, and plaintiffs' title, the complaint averred, "that at maturity said notes were duly presented for payment to said makers thereof, but were not, nor was either of them paid, nor any part thereof, of which the defendant had due notice."

The complaint also contained an averment of the amount due from the defendant upon these notes, and concluded with the usual demand for judgment. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by Mr. Justice W. F. Allen at special term, and plaintiffs appealed.

John Owen, for the appellants.—I. A complaint to be overthrown by a demurrer, under Code, § 144, subd. 6, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the allegations to be admitted, that they furnish no cause of action whatever. (*Richards a. Edick*, 17 *Barb.*, 260; *People a. Mayor, &c.*, of N. Y., 8 *Abbotts' Pr.*, 7.)

II. Section 162 of the Code applies to a complaint to charge the indorser of a bill of exchange or promissory note. (*Gay a. Paine*, 5 *How. Pr.*, 107; *Adams a. Sherrill*, 14 *Id.*, 297.) The only authority adverse is *Graham a. Machado* (6 *Duer*, 514), which it is submitted would have been decided the other way, had the complaint in that case alleged that the bill was duly presented to the drawee, as it was in this case. The interpretation which that decision gives the words "conditions precedent" in Code, § 162, is not sustained by authority. The demand, &c., necessary to charge the indorser, are properly designated *conditions precedent* to the right of recovery. (*Edw. on Prom. Notes*, 481, 483, 493; *Wolcott a. Van Santvoord*, 17 *Johns.*, 248; *Bank of U. S. a. Smith*, 11 *Wheat.*, 171; *Caldwell a. Cassidy*, 8 *Cow.*, 271; *Bank of Geneva a. Gulick*, 8 *How. Pr.*, 51.)

III. Even before the Code, when a note was made payable at the payee's office, and the payee was the holder, the averment in the complaint of a demand at the place designated was not necessary. (*Edw. on Prom. Notes*, 497; *Bank of U. S. a.*

Smith, 11 *Wheat.*, 171; *Chitt. on Bills*, 366; *Gillett v. Averill*, 5 *Den.*, 85.)

Bartholemew Skaats, for the respondent.—I. These notes being payable at a particular place, it was an essential condition of defendant's liability that they should be presented at such place for payment. (*Edw. on Prom. Notes*, 496.)

II. As the defendant is not liable, unless the notes were presented at the place of payment, the complaint should have stated the fact of such presentment at that place. This has not been done, and the demurrer was well taken. (*Spellman v. Weider*, 5 *How. Pr.*, 5; 2 *Chitt. Pl.*, 131.)

III. Section 162 of the Code cannot avail the plaintiffs. 1. That section obviously refers to conditions, properly so called, to be performed by the party himself, and expressed in the contract. It never was intended to apply to those formal acts of demand and notice, which the rules of commercial law require as the conditions of an indorser's liability. (*Graham v. Machado*, 6 *Duer*, 517.) PAGE, J., in *Adams v. Sherrill* (14 *How. Pr.*, 297), virtually expresses the same opinion. In *Woodbury v. Sackrider* (2 *Abbotts' Pr.*, 402), and *Gay v. Paine* (5 *How. Pr.*, 107), this question was not well considered. 2. The plaintiffs have not stated generally, or in any way, a performance of the conditions on their part. On the contrary, they allege a presentment to the maker, not at the place of payment, thus showing that one important condition has not been performed. The complaint may be true in every respect, and the defendant not liable. The word "duly" in this connection is of no effect; it expresses no fact, but merely a conclusion of law. (1 *Chitt. Pl.*, 236.)

IV. The complaint was not framed in reference to Code, § 162. Instead of pleading a general performance of all conditions, it sets out specifically, in the common-law method, what conditions the plaintiffs have performed. Its sufficiency should then be determined by the ordinary well-settled rules of pleading. (*Hatch v. Peet*, 23 *Barb.*, 575; *Graham v. Machado*, 6 *Duer*, 517-519.)

BY THE COURT.—CLERKE, J.—This is an action by the payees of two promissory notes against an indorser. The makers ex-

Ferner *a. Williams.*

pressly promise in the instrument to pay to the plaintiffs or order at their office, 94 Woodward Avenue, Detroit.

The complaint avers that at maturity the notes were duly presented for payment to the makers, but were not, nor was either of them paid, nor any part thereof, of which the defendant had due notice.

The defendant demurs on the ground that this averment does not show a presentment in conformity with the requirement in the note,—a demand at the makers' office, 94 Woodward Avenue, Detroit.

Although it is well settled, at least in this State, that in an action against the maker on a promissory note, payable at a particular place, it is not necessary to aver a demand at that place, it is equally well settled that such an averment is necessary in an action against the indorsers.

The demand at the place indicated in the note is a condition precedent to the right of recovery against an indorser. He contracts only to be answerable in default of the maker, after demand has been made in strict compliance with the terms of the contract, and due notice of default. Being in the character of a surety, his obligation is *strictissimi juris*. Chitty in his Treatise on Bills says: "In an action against the indorser of a promissory note, it is proper to aver a presentment at the particular place; but against the maker it is not necessary." In other words, the provision to pay at a particular place relates only to the mode in which the contract shall be executed as far as the maker is concerned, but with regard to the indorser it constitutes a condition precedent on which his liability depends. (Woodworth *a. Bank of America*, 19 *Johns.*, 391, 419; Wolcott *a. Van Santvoord*, 17 *Ib.*, 248.)

The presentment, then, of the note in this case for payment at Detroit being a condition precedent to entitle the plaintiff to recover against the defendant, the facts which constitute the performance of it should, under the old system, be specially set forth. The 162d section of the Code, however, I think, renders this unnecessary; it provides that the performance may be stated generally that the party duly performed the conditions, &c. The averment in this complaint is, that the notes were duly presented for payment to the makers thereof. The language of the Code is general, so that it may be fairly applied

to all conditions precedent; none are excepted; nor is there any sufficient reason why the Legislature should have retained the old rule in relation to negotiable paper rather than any other species of contracts. The necessity of the change applies with equal force to all.

I entirely agree with the opinions delivered at special term in *Gay a. Paine* (5 *How. Pr.*, 107), and *Adams a. Sherrill* (14 *Ib.*, 297).

The order of the special term should be reversed without costs, and the demurrer overruled, with liberty to the defendant to answer in ten days after entry, and notice of the order to be entered on this decision.

SUTHERLAND, J., concurred.

INGRAHAM, P. J. (dissenting).—I concur in the opinion of the presiding justice, so far as relates to the necessity of an averment in the complaint that a note payable at a particular place had been demanded at the place in order to change the indorser.

But I do not concur in the opinion that such averment is sufficiently made out by the words used in this complaint.

In *Gay a. Paine*, (5 *How. Pr.*, 107), such a position is distinctly laid down; and in *Adams a. Sherrill* (14 *Ib.*, 297), it was followed,—PAIGE, J., however, expressing his dissatisfaction with it.

The 162d section of the Code says: "In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally, that the party duly performed all the conditions on his part," &c.

The conditions here referred to are conditions stated in the contract to be performed on the one part, and which the other party is also required to perform on his part; but the section does not apply to those remedies which the law imposes, to enable a party having a claim against another to enforce that claim.

Even conceding that the section referred to applies to the averments necessary of a demand of payment of a promissory note, and notice of non-payment, still the averment in this com-

McMahon *a.* Allen.

plaint is not a compliance with that section. The words used in the complaint are, that the "notes were duly presented for payment to the makers thereof." This is not an averment of any demand at the place, or of performance of the condition necessary to enforce the indorser's liability. Had the averment been that the note was duly presented for payment, it might have come within Justice Gridley's decision in *Gay a. Paine* (5 *How. Pr.*, 107). But here the plaintiff avers a demand of the maker. This was not the condition. The condition was a demand at the place of payment, and it was immaterial whether the maker was there or not. Suppose, in proof of that averment, it was shown that the note was presented to the maker in New York, and properly demanded of him, it would not be argued that such presentment was sufficient; and yet that would be full proof of the allegation in the complaint.

I concur fully with WOODRUFF, J., in *Graham a. Machado* (6 *Duer*, 514), as to the construction of the 162d section of the Code, and the impropriety of applying it to the case of the demand of payment of a promissory note.

The order at special term should be affirmed.

Order of the special term reversed, and demurrer overruled.

McMAHON *a.* ALLEN.

Supreme Court, First District; General Term, Feb., 1862.

FINAL JUDGMENT. — APPOINTMENT OF RECEIVER. — APPEALABLE ORDER.

An order directing the continuance of a receivership during the pendency of any appeal which should be taken from the final decree,—*Held*, to continue the receiver's authority not only during appeal to the general term, but also during an appeal to the Court of Appeals from an order of the general term granting a new trial.

The general term will not interfere with an order at special term, appointing a receiver in a case, within the discretion of the court below.

Appeal from an order denying a motion to discharge the appointment of a receiver.

This action was brought by Dennis McMahon, Jr., assignee, &c., against Thomas E. Allen, to set aside a conveyance made by one Charles T. Harrison to Allen of an undivided half of a life-interest in a house and lot in Houston-street, in the city of New York.

The action was commenced in March, 1853. In September, 1858, and before final judgment in the cause, an order was made by consent, appointing William Tucker receiver of the rents and profits of the property. The order appointing the receiver provided that such receivership should continue during an accounting which had been ordered in the cause, and the pendency of any appeal which might be taken from any final decree "to be rendered in this cause," without prejudice to the rights of either party.

Final judgment was rendered in the action in January, 1859, in favor of the plaintiff. The defendant appealed, and upon such appeal the judgment was reversed and a new trial ordered. The plaintiff thereupon appealed to the Court of Appeals, giving the usual stipulation that if the order granting a new trial should be affirmed, judgment absolute should be entered against him.

The security given on the appeal to the Court of Appeals was an undertaking in \$250 for costs, &c. The defendant moved at chambers, before Mr. Justice Barnard, to discharge the order appointing a receiver; his motion was denied, and he took the present appeal.

Mathews & Swan, for the appellant.—I. The purposes of the receivership have been effected, and it should be discharged as a matter of course. The order has expired by its own limitation.

II. The appeal to the Court of Appeals from the order of the general term, does not stay the defendant's proceedings. (McMahon *v.* Allen, 13 *Abbotts' Pr.*, 126.) 1. The Code does not provide for a stay, but leaves it to the discretion of the court upon a proper application made for that purpose. Section 344 provides a bond to pay only costs of appeal (that is from an order), and is necessary to the validity of the appeal.

If the Court of Appeals affirms the judgment of this court, the defendant will have judgment for all the costs in the cause, but no security. Had the defendant appealed, he could not have stayed proceedings without security to pay all the costs. Sections 335-339 refer only to judgments. The distinction between appeals from judgments and appeals from orders is fully recognized by the Code in sections 11, 323, 330, 331, 334. So, also, sections 335-340 speak only of judgments. Section 342 provides that in cases not provided for in sections 345-349, the giving the undertaking for costs (§ 344) should stay all proceedings upon a judgment. 2. The case of *Curtis v. Leavitt* (10 *How. Pr.*, 481) has no application to the case of an appeal from an order. Inasmuch as the court held it was not within section 345, the provisions of section 344 made the appeal a stay of proceedings. 3. The appeal from an order is no stay. (*Forbes v. Oaks*, 2 *Abbotts' Pr.*, 120; *Hicks v. Smith*, 4 *Ib.*, 285; *Story v. Duffy*, 8 *How. Pr.*, 488; *Bacon v. Reading*, 1 *Duer*, 622.)

III. Even if the appeal from an order granting new trial operated as a stay of proceedings, the receivership should be discharged. It is not affected by the order appealed from. (*Code*, § 339.)

IV. There can never be any other final decree in this case from which any appeal can be taken. The decision of the Court of Appeals (upon the appeal from the order granting a new trial, and the plaintiff's stipulation to allow final judgment) must be final as to both parties.

Dennis McMahon, for the respondent.—I. By stipulation of parties, and by the terms of the order of September, 1858, the receivership was to continue until the final judgment to be rendered in this cause, and until the determination of any appeal which might thereafter be taken from the decision of the general term in this case.

II. The appeal from the decision of the general term granting a new trial herein, is a stay of proceedings on the part of the defendant. The respondent took that appeal to the Court of Appeals under section 11, subd. 2, of the Code,—which provides that in order to make an appeal from an order granting a new trial effective, the appellant must stipulate that final judgment be rendered against him. This was done, and he also filed an

North a. Sargeant.

undertaking in \$250 for costs of the appeal, the sureties on which have justified. Under sections 334-339 of the Code, on appeal from an order granting a new trial, all the security the appellant has to give is the undertaking in \$250. Section 335 applies to appeals from judgments directing the payment of money.

BY THE COURT.*—INGRAHAM, P. J.—We think the consent authorized the appointment and continuance of the receiver until final judgment in the cause, and until a decision on such final judgment on appeal.

The general term having reversed the judgment rendered, there is as yet no final judgment in the cause, and the receivership would continue until the cause went back to special term for a new trial. The reason for a receiver is just as good now as it was when a receiver was first appointed.

The appeal on behalf of the plaintiff to the Court of Appeals does not change the state of things, except that if decided against the defendant it would revive the final judgment which has been set aside. Until then the defendant is not entitled as a matter of right to have the receivership discharged. As a matter of discretion on the part of the judge at special term we do not interfere.

The order should be affirmed.

NORTH a. SARGEANT.

Supreme Court, First District; General Term, Feb., 1862.

Also, at Special Term, October, 1861.

COSTS ON GRANTING NEW TRIAL.—LEAVE TO DISCONTINUE.— ORDER OF CALENDAR.

Upon granting a new trial, when the judge before whom the trial was had committed no error, payment of the costs of the trial, and of all subsequent proceedings should be imposed as a condition of granting the favor.

* Present, INGRAHAM, P. J., CLERKE and LEONARD, JJ.

North a. Sargeant.

An order requiring payment of the costs accruing after notice of the trial had, as a condition of granting a new trial, construed to mean the same as the above rule.

After such an order is made, the costs must be regularly adjusted before the time allowed for their payment, under Rule 57, begins to run, and this notwithstanding the costs are fully stated on the judgment-roll, and require nothing more than to be separated from the other and earlier costs of the action.

After a new trial has been granted, by the general term, on payment of costs, plaintiff will not be allowed by the special term to discontinue while the amount of the costs is in dispute and unpaid.

The court will not at special term fix the date as of which a cause is to be placed in the calendar. The date is controlled by the statute, and if it is put on incorrectly, application must be made at circuit.

I. *February*, 1862.—Appeal from an order setting aside an execution issued by the defendant upon a judgment entered in his favor for costs.

The judgment had been appealed from by the plaintiff to the general term, and a new trial granted "on payment by the plaintiff of all the costs of the action from and after notice of trial." The costs already adjusted and entered up in the judgment amounted to \$104.65, of which \$84.65 had accrued "after notice of trial." The costs of the appeal, *i. e.*, those costs in the action which had accrued after the docketing of the judgment, had been fixed at \$50.84. The defendant claimed the sum of \$84.65 as having accrued from and after notice of trial up to the entry of judgment, and the further sum of \$50.84 as the costs that had accrued after entry of judgment, on the appeal to the general term, amounting in the aggregate to the sum of \$135.49.

The plaintiff claimed that he was bound to pay only the costs of appeal, to wit: the said sum of \$50.84, and tendered that sum, which the defendant refused to accept. After the expiration of the 20 days allowed for payment of the costs under Rule 57 of 1858, the defendant issued an execution upon the judgment for the sum of \$104.65. The defendant moved at special term, before SUTHERLAND, J., to set aside the execution, on the ground that the tender of the sum of \$50.84 was sufficient, and all that the defendant was entitled to as a condition of a new trial; which motion was granted. From this decision the defendant appealed to the general term.

A. Thompson, for the appellant.

I. T. Williams, for the respondent.

BY THE COURT.—LEONARD, J.—The order of the general term, March 18, 1861, reversed the judgment of the special term, and directed that a new trial be had in said action, on payment by the plaintiff of the costs of all proceedings in said action, from and after notice of the trial had therein.

This language includes the costs of the trial below “had therein,” and the costs of the appeal.

The attorney for the defendant refused to accept any less than all the costs after the first notice of trial which was served in the action.

There has never been any adjustment of the costs under the order of the general term above mentioned, which is required to set the 15 days running, under Rule 57, before the plaintiff can be considered to be in default for not complying with the condition of the said order. No execution could issue regularly on the judgment so reversed until the plaintiff was in default under that rule.

The execution issued by the defendants on the judgment below for costs was therefore irregular, and the order setting it aside must be affirmed.

The order of the general term is not as exact in its terms as could be desired, and the affirmance is therefore without costs.

We are the better satisfied to make this affirmance without costs, as the attorney for the plaintiff has never offered to pay the amount of costs which the usual practice in the like cases, as well as the terms of the order of the general term above defined, requires.

Where an erroneous verdict has been rendered by a jury, without any error occurring in the rulings or instructions of the court at the trial, the practice has prevailed for a long time, when a new trial is granted, to direct such new trial upon the condition of payment of the costs of the trial and all subsequent proceedings by the party in whose favor the relief is granted.

We understand the order of the general term to embrace this condition and no more.

The costs of the trial and subsequent proceedings can be

North *a.* Sargeant.

easily ascertained from the orders and bills presented in the moving papers herein. For the purpose of avoiding all further misunderstanding of the meaning and intent of the condition imposed by the order of the general term granting a new trial, we consider it advisable that the said order should be so modified as to direct the new trial to be had on payment by the plaintiff of the costs of the trial, and all subsequent proceedings, which are hereby fixed at the sum of \$85.49.

II. *October*, 1861.—Motion for leave to discontinue as against one defendant, and to place the cause on the calendar as against the others.

Pending the appeal above reported, and before its decision, the plaintiff moved at special term for leave to discontinue, without costs, as against the defendant Houghton, who had died, and for an order that the cause be placed on the calendar as of October 26, 1857, as to the other defendants.

BARNARD, J.—In this case defendants Sargeant and Akin were sued as the makers, and defendant Houghton as the indorser of a promissory note. Issue was joined October 26, 1857. Defendants had a verdict at circuit, and judgment thereon was entered in their favor for — costs. From this judgment plaintiff appealed to the general term, where an order, on the 18th of March, 1861, was made, reversing the judgment, and granting a new trial on payment by the plaintiff of the costs of all proceedings from and after the notice of the trial had therein. The question as to the amount of costs to be paid is in dispute, and is pending before the general term. Defendant Houghton is dead. An order permitting plaintiff to discontinue as against defendant Houghton without costs, and directing the action to be placed on the circuit calendar as of October 26, 1857, and that plaintiff be allowed to proceed to trial against defendants Sargeant and Akin, is now moved for. As to ordering the cause to be placed on the calendar as of October 26, 1857, the statutes regulate that matter.

The attorney must put the cause on the calendar as of such date as the statutes authorize. If it is put on incorrectly, the circuit is the proper place to move for a correction of the calen-

dar. This branch of the motion must be denied. In reference to the other branch of the motion, as the case now stands, defendants have a judgment against the plaintiff for costs. From this judgment the general term has given the plaintiff relief conditioned on his paying costs.

The amount of the costs to be paid is in dispute. This general-term decision does not authorize the special term to relieve the plaintiff from the effect of a judgment in favor of a deceased defendant without a compliance with its terms. Nor does it authorize an order permitting plaintiff to proceed as against the surviving defendants without such compliance. It is insisted by plaintiff, that the costs, as taxed on appeal to the special term, have been tendered. The defendants insist that these costs have not been accepted, and that an appeal has been taken to the general term. The costs of the appeal to the general term from the judgment, were taxed at the special term, on the appeal from the taxation by the clerk, at \$50.84. I do not understand how these costs could be so small, unless, indeed, the defendants did not notice or put the cause on the general-term calendar. There is room for argument as to the construction of the general-term order of March 18, 1861. Whether it means that all costs of the court below after notice of trial shall be paid, together with the costs of the appeal; or only costs of the court below accruing after the said trial, together with the costs of the appeal. This question, in the view I have taken of the motion, does not arise. In this state of the case, I do not think it proper to grant an order which may deprive the defendants of their costs. The motion for leave to discontinue as to the defendant Houghton, and to proceed as against the other defendants, must be denied without prejudice to renew after the decision of the general term upon appeal from the special-term order of May 9, 1861, or the dismissal of that appeal; upon which removal the question of the construction of the general-term order of March 18, 1861, may be raised, and such order made as to payment of costs as will protect defendants' rights.

No costs of this motion to either party.

Bortle *a.* Mellen.

BORTLE *a.* MELLEN.*Supreme Court, First District; At Chambers, February, 1862.*

FAILURE TO SERVE EXCEPTIONS.

Section 174 of the Code authorizes the court to allow in its discretion exceptions to be served after the time prescribed by section 272 has expired.

Motion for leave to serve exceptions, and to allow sureties on appeal to justify.

This was an action by Richard Bortle and another against William H. Mellen and another, upon a bond given on the discharge of a steamboat from attachment. The cause was tried before a referee, who rendered judgment for the plaintiffs. The defendants' counsel procured various extensions to serve exceptions, until sixty days after notice of the entry of judgment. In the mean time the defendant served notice of appeal, and procured an undertaking to stay proceedings pending the appeal. The plaintiffs excepted to the sufficiency of the sureties in the undertaking. Notice of justification was served, but the sureties were prevented from attending by a severe storm. The time to serve exceptions expired, and the plaintiffs refused to extend it. The defendant made the present motion.

Benedict, Burr & Benedict, for the motion.

D. & T. McMahon, opposed.

LEONARD, J.—The case of *Beach a. Gregory* (2 *Abbotts' Pr.*, 203; and 3 *Ib.*, 78) is authority adverse to the defendants' motion. On the other hand, *Sheldon a. Wood* (14 *How. Pr.*, 18) is a case in which the right to permit exceptions to be filed after the time allowed by section 272 of the Code has expired, was exercised by the Superior Court.

The true construction of section 174 warrants the exercise of such authority in the discretion of the court.

In the present case the time to file exceptions was permitted by the defendants to elapse, after it had been extended by consent for several weeks beyond the time required by the Code.

I think no satisfactory excuse has been offered for this neglect, or for the neglect since occurring in not moving.

Without exceptions the appeal will not serve to obtain a review of the decision, and will not result in any practical utility to the defendant in procuring relief from the judgment.

The omission of the sureties to justify has been perhaps sufficiently excused; but it would be useless to permit the sureties to justify, and withhold the relief asked for in respect to the serving and filing case and exceptions.

The motion is denied without costs.

ACKERMAN *a.* ACKERMAN.

New York Common Pleas; General Term, March, 1862.

ATTORNEY'S LIEN FOR COSTS.—EFFECT OF SATISFACTION-PIECE.— REGULARITY OF EXECUTION.—TRIAL BY JURY.

An execution cannot be issued upon a judgment which has been satisfied by the filing of a certificate, as prescribed by 2 *Rev. Stat.*, 362. If the satisfaction is voidable for any cause, it must be vacated by the court before execution can be issued.

The lien of the attorney is an equitable right to be paid for his services out of the proceeds of the judgment or other proceeding obtained by his labor and skill, which the court will compel to the extent of its equitable power. Under the Code, the lien is not limited to the taxable costs; but the attorney, unless the proceeds have come into his hands, must invoke the equitable aid of the court to ascertain the existence and amount of the lien before any steps can be taken to enforce it.*

Payment by a judgment-debtor to a judgment-creditor, of the amount of the judgment, is valid against the lien of the attorney, unless the debtor has notice of the attorney's claim by way of lien to a portion of such judgment.

The lien of the attorney attaches not merely to the costs in the judgment but to the whole judgment—damages and costs.

* Compare 11 *Ante*, 256.

Ackerman *v.* Ackerman.

On application to the court to protect the lien of the attorney, the existence and extent of such lien may be determined in a summary way—as by a reference. The client cannot claim a right to trial by jury.

Appeal from an order denying a motion to set aside an execution, except on payment of the attorney's lien.

This action was brought by Peter J. Ackerman against John P. Ackerman, upon two bonds amounting to \$4,200. Judgment was recovered in favor of the plaintiff, on failure to answer, on October 13, 1860, for \$4,565.89, damages, and \$17.73, costs. On October 15, 1860, the plaintiff's attorney, Aaron P. Whitehead, Esq., caused notice to be served on the defendant to the effect that he had a lien upon the judgment for the costs and disbursements, and also for the additional sum of one hundred dollars as a counsel-fee, and forbidding defendant to settle with the plaintiff without paying off this lien. On October 17, 1860, the parties to the action assumed to settle the same; and plaintiff executed and acknowledged satisfaction, and the judgment was marked satisfied of record. The defendant, before taking the satisfaction, paid to the plaintiff's attorney \$43.66, by way of costs and disbursements of the suit. On October 20, 1860, the plaintiff's attorney issued an execution upon the judgment, reciting that \$72.27 was due upon it, and directing the collection of that sum.

The defendant moved at chambers, before Hon. Judge Brady, to set aside the execution. The motion was opposed by the plaintiff's attorney, with an affidavit detailing the labor and difficulty in the prosecution of the suit, and in obtaining judgment, and setting forth that prior to the settlement of the suit his account for \$121.87 was submitted to the defendant, and that the latter agreed to pay the same on settling the suit, and that on another occasion defendant called and apologized for not paying as agreed, on account of having forgotten one of his savings-bank books.

The motion was denied unless defendant should pay \$72.27, the balance due under the attorney's lien. The defendant appealed.

Townsend & Kane, for the appellant.—I. The settlement between the plaintiff and defendant was not in fraud of any of the

rights of the plaintiff's attorney. 1. He received the costs taxed in the judgment. 2. The plaintiff's attorney was to be paid by the defendant his fee, and not by the plaintiff or out of the damages. The plaintiff only received what he was entitled to,—the defendant, if he was liable to plaintiff's attorney, remains so. The plaintiff's attorney may have an action against the defendant, but he is not entitled to the summary mode he has adopted to recover his fee.

II. The issuing of the execution after the judgment had been satisfied of record, even though the plaintiff's attorney had a lien, was improper, and the execution should have been set aside on this ground. It has been the universal practice to vacate the satisfaction of judgment before issuing execution, in cases of this kind. (*Rooney a. Second Ave. R. R. Co.*, 18 *N. Y.*, 368; *Ward a. Wordsworth*, 1 *E. D. Smith*, 598.) The defendant was not given the opportunity of refuting the statements in the affidavit of plaintiff's attorney. If the regular course had been pursued by plaintiff's attorney, the merits of his claim could be investigated.

Aaron P. Whitehead, for the respondent.—I. This is a case where plaintiff and defendant combined after judgment to defraud plaintiff's attorney of his counsel-fee, defendant having full notice of the lien, and being warned not to settle without paying it. Defendant settles at his peril after notice. (*Ward a. Wordsworth*, 1 *E. D. Smith*, 598; *Hall a. Ayer*, 9 *Abbotts' Pr.*, 220; *Rooney a. Second Ave. R. R. Co.*, 18 *N. Y.*, 368.)

II. The satisfaction-piece was filed in fraud of plaintiff's attorney, and was therefore, as to him, absolutely void. All fraudulent acts are void. Plaintiff's attorney was ignorant of the filing of it, and issued the execution of it innocently. If the execution should be set aside, the sheriff's fees would be thrown on plaintiff's attorney, and the defendant would thus take advantage of his own wrong.

BY THE COURT.*—DALY, F. J.—The execution was erroneous for two reasons. In the first place, there was no judgment upon which it could issue, the judgment having been satisfied in the

* Present, DALY, F. J., HILTON and BRADY, JJ.

Ackerman *a.* Ackerman.

mode pointed out by law (2 *Rev. Stat.*, 362; same stat., 5 ed., vol. 3, 640); and in the second place, the fact that the attorney had a lien, and the amount of it had never been ascertained so as to entitle it to be enforced by execution.

The attorney's remedy in the first instance was to move the court to vacate the satisfaction of the judgment; and that being done, he would then have been in a position to apply to the court to enforce his lien, if he had one. (*Groves a. Earles*, 5 *Taunt.*, 429; *Griffen a. Eyles*, 1 *H. Bl.*, 122; *Walsh a. Hale*, 1 *Doug.*, 238; *Reed a. Dupper*, 6 *T. R.*, 361; *Charlwood a. Berridge*, 1 *Esp.*, 345; *Ward a. Wordsworth*, 1 *E. D. Smith*, 598; *Rooney a. Second Ave. R. R. Co.*, 18 *N. Y.*, 368.) But he seems to have acted under the impression that he alone had the right to determine the fact of the existence of a lien as well as the amount of it; that his client had no right to be heard; and that he was at liberty to issue execution against the defendant for such sum as he considered himself entitled to for counsel-fees, although the judgment was satisfied by the agreement of the parties, and was discharged of record. This was altogether erroneous.

The lien of the attorney is merely an equitable right to be paid for his services out of the proceeds of the judgment or other proceeding which has been obtained by his labor and skill; which the court will compel to the extent of its equitable power. It is distinguishable in this respect from the ordinary lien which a party has upon a thing in possession, which he is enabled himself to protect by refusing to deliver the property until his claim is satisfied. The attorney, unless the proceeds have come into his hands, must invoke the equitable aid of the court; and, as in every case of the exercise of its equitable powers, the court must be satisfied of the existence of the equitable right before any steps can be taken to enforce it. Formerly, in this State, when the attorney's compensation was fixed absolutely by statute, no inquiry was necessary to ascertain the amount of his lien. The attorney could recover from his client no other or greater sum for his services than the client could recover for the same services from the defeated party. (2 *Rev. Stat.*, 650, § 5.) The measure of compensation in the one case was equally the measure of compensation in the other; and when the costs, therefore, were taxed and incorporated in the

judgment, the judgment showed upon the face of it the exact extent of the attorney's lien. But now, by the Code, all provisions restricting or controlling a party from agreeing with an attorney for his compensation are abolished, and the "measure of such compensation" is now left, in the language of the Code, to the agreement, express or implied, of the parties. It is impossible for the court now to know what the attorney is entitled to, unless evidence is produced of the agreement of the parties, or from which an agreement may be implied, together with proof of the actual value of the services rendered; and I suppose that the proper course is to move the court, as was done in *Read v. Dupper* (6 *T. R.*, 361), for an order of reference to ascertain the amount of the attorney's lien. If there has been an express agreement, and the fact of the services rendered is not denied upon the motion, a reference, of course, would be unnecessary; but until, by some such mode, the fact and the amount of the attorney's lien is ascertained, he is not in a position to obtain the equitable aid of the court.

It has been decided by the Supreme Court of the Third Judicial District in *Haight v. Halcomb* (7 *Abbotts' Pr.*, 210), that under the Code the attorney's lien is limited to the amount allowed to the prevailing party as costs; and if that decision is correct, the attorney in this case had no lien, as he had already received the amount allowed to the prevailing party in the judgment—the lien which he claimed to have, being for the balance of a counsel-fee. I do not, however, give my assent to the correctness of that decision. The grounds upon which it is founded, as gathered from the opinion of Justice Gould, appear briefly to be these: that the attorney's lien before the Code was limited to the costs in the judgment; that the allowance now given to the prevailing party is a substitute for and in strict analogy to the costs under the old fee bill; that there is, upon the judgment-roll itself, a claim of which all parties have notice, and in any settlement with the party the defendant settles these costs at his peril; that the agreement between the attorney and client is indefinite, or known only to themselves, and that it does not appear upon the face of the record; that there is no short method to which an attorney is entitled, by which to settle what is in dispute between him and his client, and that no party can ever be safe in settling a judgment against the claim of an attorney,

Ackerman *a.* Ackerman.

but must abide the due course of an execution which will necessarily be collected before the attorney and his client can have their differences decided.

To all this it may be answered: I. That if the attorney's lien was formerly limited to the amount of the costs in the judgment, the reasons given for so holding (*Scott a. Elmendorf*, 12 *Johns.*, 315) was because that was all that he could recover for his services, a reason which no longer exists.

II. The entry of costs in the judgment-roll does not operate as a notice to the party liable upon the judgment that the attorney has a lien. These costs belong to the party, and not to the attorney (*Ward a. Wordsworth*, 1 *E. D. Smith*, 598), and the attorney may have received his costs from his client, though the client has not obtained the costs to which he is entitled by his judgment. The inference, therefore, that there is a claim on the part of the attorney apparent upon the face of the judgment to the amount of the costs there included, and that the defendant settles these costs at his peril, is without foundation. The party liable incurs no peril at all in paying the judgment, together with the costs included in it, to the prevailing party, or in settling or discharging the judgment in any way that the parties agree upon, unless he has actual notice of the fact of the attorney's lien and of the amount of it. If, however, after he has knowledge of the lien, he pays or settles the whole judgment with the prevailing party, he does so in his own wrong, and the court will allow the judgment to be enforced against him to the extent of the attorney's claim. (*Martin a. Hawks*, 15 *Johns.*, 405; *Swain a. Senate*, 5 *Bos. & P.*, 99.) If, says Lord Kenyon, in *Read a. Dupper*, *supra*, the money has been paid over *bona-fide* to the plaintiff without notice from the attorney of his lien, such a payment would be good; but if in violation of the notice, it cannot be suffered; and he likens it to the case of an assignment of a chose in action where payment is made to the principal after notice of the assignment, which is considered as being made in fraud of the rights of the assignee, and is not therefore available to the party making it.

III. The attorney's lien does not, as would seem to be the impression of Justice Gould, attach merely to the costs in the judgment, but attaches to the whole judgment, damages as well as costs. (*Randle a. Fuller*, 6 *T. R.*) It is an equitable right,

to be paid out of the proceeds of that which was obtained by his labor and skill, and the court will interpose to the extent of his claim, to prevent the client from receiving the whole proceeds, without discharging the obligation which he owes to the attorney; and if the other party, after notice, enables the client to do so, by settling the whole claim with him, he does so at his peril. If, after being notified of the attorney's lien, an execution is issued against him, he can discharge himself from all further obligation in the matter by paying the amount of the judgment and costs to the sheriff. The money is then brought into court (*Cannon v. Smallwood*, 3 *Lev.*, 203), and if the fact or the amount of the attorney's claim is in dispute, the client or the attorney may apply to the court, and the sheriff will pay over the proceeds in accordance with such order as the court may make in the premises.

IV. I have already pointed out the short method by which the fact and the amount of the attorney's lien may be ascertained. In *Haight v. Holcomb* a reference was ordered, but the plaintiff refused to appear upon it, claiming that he had a right to a trial by jury upon the question in difference between himself and his attorney, and that the court could not compel him to have it settled by a reference, and Justice Gould says that he is unable to see why the position taken by the plaintiff was not a sound one. The simple answer to the objection is, that the power which a court exercises in the matter of an attorney's lien is an equitable one, in which the aid of a jury is not necessary, and cannot be demanded as a matter of right. In *Wilkins v. Carmichael* (1 *Doug.*, 100), which is the first reported recognition of it in the common-law courts, Lord Mansfield refers to it as a practice established upon general principles of justice, by which an attorney may obtain an order to stop his client from receiving money recovered in a suit in which the attorney was employed, until his bill is paid. It was introduced into the common-law courts from the Court of Chancery (*Turwin v. Gibson*, 3 *Atk.*, 720), and like the practice of setting off judgments, and other equitable powers incident to courts of common law, it has always been a matter of equitable cognizance. The mistake lies in confounding a right of trial by jury,—which would exist if the attorney had brought an action against his client, and sought to obtain a judgment,—with a pro-

ceeding for an equitable application of fund under the control of the courts.

In lieu of what was given to the prevailing party, under the old fee bill, for the services rendered by an attorney in the prosecution of the cause, certain sums are now given which are not graduated as formerly according to each particular act of service, but are allowed in gross sums at certain stages in the proceeding. These amounts are positively fixed, but there is nothing limiting the attorney's compensation to the amount of these allowances. The repeal of the former restrictions, the omission to enact any thing analogous in its place, and the explicit declaration that the measure of compensation is hereafter to be left to the agreement, express or implied, of the parties, show very plainly that no limit was intended. The client may agree with his attorney for more or for less, or upon an implied agreement the actual value of the attorney's services may be much greater than the amount allowed by statute to his client. However the fact may be, whether his compensation is fixed by the express agreement of the parties, or is ascertained by proof of the actual value of his services, he has upon equitable grounds a right to have his just claim satisfied out of the money obtained through his instrumentality. As respects the party who is to pay the money, he is not affected unless he pays it wrongfully after notice of the attorney's claim; and as respects the client, it is just that the attorney should be paid before he gets the proceeds. In England the lien attaches though the attorney's claim is unascertained (Read *v.* Dupper, *supra*), just as the lien of the tailor attaches to the garment he has made, though the parties may not have agreed as to the price of his labor. The limit of the lien is the amount to which the attorney is entitled, and the mode by which it is ascertained has nothing to do with the nature or existence of the right. The right has been established by a long series of decisions, and as there is nothing in the Code limiting the attorney's compensation to the amount allowed to the prevailing party, there is no ground for holding that his lien is confined within that limit.

The order appealed from should be reversed.

MARSHALL *a.* CANTY.

New York Common Pleas; General Term, March, 1862.

ATTACHMENT IN JUSTICES' COURTS.—JURISDICTION.—CONSTABLE'S RETURN.

Before a justice of the peace, or a district court of the city of New York, can acquire jurisdiction to proceed to trial in an action commenced by warrant of attachment, the return of the officer serving the attachment must show a strict compliance with the statute: especially where the defendant has not appeared. In cases of attachment issued out of a justice's court, or district court of New York, service of the attachment and inventory upon a person in charge of the property attached is insufficient, unless it appears affirmatively that the defendant has no place of residence within the county.

Appeal from a judgment of a district court in the city of New York.

This action was brought by George Marshall against John Canty, in the district court, in the city of New York, for the Eighth Judicial District, upon a promissory note for \$67.70. The plaintiff obtained an attachment under the act abolishing imprisonment for debt and to punish fraudulent debtors.

The constable who received the attachment, seized the stock and fixtures of a liquor store, and a quantity of wines, liquors, cigars, beer-pumps, and bottles; and on returning the attachment, indorsed on it the following certificate:

"By virtue of the within attachment, I attached and took into my custody the goods and chattels of the defendant, mentioned in an inventory hereto annexed, on the 6th day of September, 1861; and immediately on the same day I made a copy of said attachment and inventory of the property so seized, and served a copy of said attachment and inventory of the property, duly certified by me, on the brother of the defendant, James Canty, the person in charge of the said goods, because the defendant could not be found in the city and county of New York, that place being the last place of residence of the said John Canty, in this county."

Marshall a. Canty.

On the return of the attachment, the defendant did not appear; whereupon a summons was taken out, which was returned to the court with the certificate of the constable, as follows:

"The within-named defendant, John Canty, is not to be found in the county."

The plaintiff proved the indebtedness upon the note in suit, the defendant not appearing; and judgment was rendered for the plaintiff for the amount claimed.

The defendant now took an appeal from this judgment.

Samuel B. Logan, for the appellant.—The statute expressly declares that the return must state that due diligence has been made to serve the defendant, which is not stated here. Nothing can be inferred in support of the proceeding, that does not affirmatively appear by the return. It does not even appear when the summons was delivered to the officer.

Gideon L. Walker, for the respondent.

BY THE COURT.—HILTON, J.—This action was commenced by attachment, under the authority contained in section 20 of the District Court Act of 1857 (1 *Laws of 1857*, 713, ch. 344, § 20), which applies to these courts all laws relating to attachments issued by justices of the peace. The constable returned that he served a copy of the attachment and inventory of the property seized, upon the brother of the defendant, "James Canty, the person in charge of the said goods, because the defendant could not be found in the city and county of New York, that place being the last place of residence of the said John Canty in this county."

The law requires that the officer executing the process "shall immediately make an inventory of the property seized, and shall leave a copy of the attachment and of the inventory, certified by him, at the last place of residence of the defendant; but if the defendant have no place of residence in the county where the goods and chattels are attached, such copy and inventory shall be left with the person in whose possession the goods and chattels are found." (2 *Rev. Stat.*, 231, § 31; same stat., 5 ed., vol. 3, 431, § 29.) But if the defendant can be found in the county, the copy shall be served upon him personally, and the

return of the officer shall state specifically whether the copy was or was not personally served. (*Laws of 1831*, ch. 300, § 36; same stat., 3 *Rev. Stat.*, 5 ed., 463, § 218.)

The return made was defective, in not showing that the constable had complied with these provisions. It does not appear from it that the defendant had no place of residence within the county; but, on the contrary, it would seem to be inferred from it that he had; nor does it specifically state whether the copy of the attachment and inventory, was or was not personally served. The warrant of attachment is an extraordinary process of these courts, and before a justice can acquire jurisdiction to proceed to trial in an action thus commenced, the return of the officer must show a strict compliance with the statute. (*Watts a. Willett*, 2 *Hill*, 212; *Barnes a. Harris*, 4 *N. Y.*, 374.) And especially is this essential where, as in the present case, there has been no appearance of the defendant. (*Stewart a. Smith*, 17 *Wend.*, 517; *Wheeler a. Lampman*, 14 *Johns.*, 481.) It is a regular return only, showing that the property has been attached (3 *Rev. Stat.*, 5 ed., 463, § 220), that can give jurisdiction in such a proceeding, and will authorize the justice to issue a summons, and proceed to a hearing of the cause in the absence of the party proceeded against.

For aught that appears in this return, the defendant had a place of residence in the county; and if this was so, then the copy of the attachment and inventory should have been left there, instead of serving them upon the person in charge of the goods seized. It is only where the return shows affirmatively that the defendant had no such place of residence, that the statute permits the substituted service to be made.

Judgment reversed.

THE INTERNATIONAL LIFE ASSURANCE CO. *a.*
SWEETLAND.*Supreme Court, First District; At Chambers, March, 1862.*

PLACE OF TRIAL.—RESIDENCE.

In the actions referred to in section 125 of the Code, the place of trial must be laid in a county in which some one of the parties to the action resides, without regard to the convenience of witnesses.

A foreign corporation, having an agency and business office in one of the counties of this State, is not a resident of such county within the meaning of section 125 of the Code.

Motion to change the place of trial.

The plaintiff in this action was a foreign corporation; the defendant, James M. Sweetland, executor, &c., resided in Madison county in this State. The plaintiff had an agency in the city of New York for the transaction of business. The action was one of those mentioned in section 125 of the Code. The plaintiff laid the place of trial in the city and county of New York. The defendant seasonably served a demand to have the place of trial changed to the proper county, and now made the present motion.

John Fitch, for the motion.

Platt, Gerard & Buckley, opposed.

BARNARD, J.—The plaintiff is a foreign corporation, and the defendant resides in Madison county.

The proper place of trial is in that county.

The fact that plaintiff has an agency established in the city and county of New York does not affect the question. On this motion, the place of trial cannot be retained on the ground of convenience of witnesses. This is decided in 7 *How. Pr.*, 356, and I see no reason for dissenting from that case. If plaintiff desires to have the place of trial in the city and county of New

 Chamberlain *a.* Dempsey.

York for convenience of witnesses, he must make a distinct motion therefor; in which case the defendant will be at liberty to show that convenience of witnesses requires the place of trial to be in Madison county.

Motion granted, with \$10 costs.

 CHAMBERLAIN *a.* DEMPSEY.

New York Superior Court; General Term, March, 1862.

MISTRIAL.—FORECLOSURE.—USURY AS A DEFENCE.—EFFECT OF ADMISSIONS.

Where an action has been tried before the court without a jury, the only authority for entering judgment is the decision of the judge who tried the cause. A reference to compute the amount of the recovery, if not authorized by the decision, is irregular.

On a trial by the court without a jury, the failure of the judge to specify the relief granted or the determination of the action, is an irregularity of which advantage may be taken even on appeal from the judgment.*

In case of usury, the contracting party, in an action at law upon the contract, or in equity upon securities collateral to the contract, the owner of the property, or one having a valid lien upon it by mortgage or execution, is entitled to interpose the defence as a matter of strict right.

In a foreclosure to which the defence of usury is interposed by a grantee of the mortgagee, an admission that such grantee is the owner of the premises imports that the conveyance by which the grantee acquired title was in hostility to the mortgage.

Appeal from a judgment of foreclosure and sale.

On the trial of this action the court refused to allow evidence to be given that the notes to secure which a mortgage was given were founded on a usurious consideration, although it was admitted that the "defendant was the owner of the premises" incumbered, on the ground that the defendant, not being the owner at the time of the execution and delivery of the mortgage, and having become so subsequent to that time, must be regarded

* Compare *Lewis a. Jones*, 13 *Ante*, 427.

*Reversed
15 Feb. 1862
9 Botm. 540.*

Chamberlain *a.* Dempsey.

as having had notice of it, and was not in a position to avail himself of the defence. The trial below is reported, 13 *Ante*, 61, 421. The defendant Dempsey appealed.

George R. Thompson, for the appellant.—I. It is well settled that if a borrower, at a usurious rate, made an unqualified sale of property pledged to secure the usurious loan, the purchaser may plead the statute; and the purchaser of land may show usury in a mortgage existing at the time of his purchase to defeat a foreclosure. (Post *a.* Dart, 8 *Paige*, 639; Shufelt *a.* Shufelt, 9 *Ib.*, 137; Vroom *a.* Ditmas, 4 *Ib.*, 526; De Wolf *a.* Johnson, 10 *Wheat.*, 367; Lloyd *a.* Scott, 4 *Pet.*, 205; Berry *a.* Thompson, 17 *Johns.*, 436; Green *a.* Kemp, 13 *Mass.*, 515; Trumboo *a.* Blizzard, 6 *Gill & Johns.*, 18; *Blydenburgh on Usury*, 106–108.)

II. The case of *Sands a. Church* (6 *N. Y.*, 347) does not conflict with this principle. There the mortgagor sold subject to the mortgage, which does not appear in the case at bar.

III. The admission made at the trial, that “the defendant is the owner of the mortgaged premises,” means that she is the owner in fee.

Wm. M. Allen, for the respondent.—I. The mere allegation of ownership in fee, without any proof as to the circumstances under which the defendant acquired such ownership, notwithstanding the admission at the trial, will not entitle the defendant to prove usury. That admission means that she is the owner subject to the mortgage. (*Sands a. Church*, 6 *N. Y.*, 347; *De Wolf a. Johnson*, 10 *Wheat.*, 392, and cases cited.)

II. No one but a party to the contract can avoid it on the ground of usury. (Post *a.* Bank of Utica, 7 *Hill*, 391, 406; *Green a. Morse*, 4 *Barb.*, 332.)

BY THE COURT.—BOSWORTH, C. J.—The defendant Dempsey alone appeals from the judgment. In her answer she expressly admits “the execution of the notes and mortgage” described in the complaint. Taking her answer to be true, she admits the notes to be unpaid.

There is, therefore, sufficient evidence to sustain the finding of fact as to the making and delivery of the notes, and the

Chamberlain a. Dempsey.

making and delivery of the mortgage, and the non-payment of the notes at maturity.

The decision of the judge is dated Nov. 30, 1861, and contains his findings of fact and conclusions of law. The latter are two in number: *First*, "that the plaintiff is entitled to judgment of foreclosure and sale of such mortgaged premises, for the purpose of discharging the amount of principal and interest due upon such mortgage, together with costs of suit;" and *Second*, "that the plaintiff is not entitled to a judgment for any deficiency which may appear upon the sale of such mortgaged premises." The defendant excepts to the first conclusion of law only.

The record does not show that any judgment has been rendered on this decision. The Code does not contain any authority to enter a judgment otherwise than upon and according to the decision. (*Code*, § 267.) The cause was tried before Judge Hoffman without a jury. If he intended a reference to compute the amount due on the notes, it should have been directed as part of his decision.

But the record states that on the 26th of November, 1861 (four days prior to Judge Hoffman's decision), Judge Moncrief made an order of reference to compute the amount due. The referee's report, under this order of reference, is dated November 27, 1861. The minutes of the proceedings before the referee form part of the case, and show that the proceedings were commenced before him on the 26th of November. They also purport to state which of the parties appeared before him. Mrs. Dempsey is not one of them. She could not have had notice of them for the full time required by the established practice. The judgment entered bears date the 7th of December, and is ordered by Mr. Justice White, and not only does not, in its recitals, contain any direct allusion to the trial before Judge Hoffman, but purports to be made on proof of personal service of the summons on all the defendants, the aforesaid order of reference, and the report of said referee.

There could be no authorized judgment except one entered upon the decision of the judge who tried the cause. That decision is the authority for it, and there can be no other. If that had directed a reference to compute the amount due, the report of a referee ascertaining it would determine that question on becoming absolute. But it would not of itself constitute any

Chamberlain *v.* Dempsey.

authority to enter a judgment of foreclosure and sale. At most it would determine the amount the plaintiff was to be paid out of the proceeds of a sale, made by virtue of a judgment, entered on Judge Hoffman's decision.

I regard all these proceedings as irregular and unauthorized. The defendant Dempsey should have moved to set them aside as irregular, if she did not assent to them. Instead of that she appeals, in terms, from the judgment "entered herein on the 7th of December, 1861." That judgment recites the order of reference, and the order of reference recites that "the issue joined by the answer of said Dempsey having been disposed of, and the facts set up in the answer of Delaplaine and Platt admitted by plaintiff," &c.

The decision of the judge who tried the cause does not dispose of the issues made by the answers of Delaplaine and Platt, by any thing contained in the terms of the findings of fact. If they are incumbrancers prior to the plaintiff, the judge who tried the cause should have so found, and directed a sale subject to their mortgages, or that they be first paid.

That another judge has power, at another or the same term of the court, to make a decision declaring the priority of the liens of the parties to the action, differently from the judge who tried the cause, no one will pretend. And if the judge who tried the action has not, in terms, or by necessary implication, decided the question, then there is a mistrial.

The decision that the plaintiff is entitled to a judgment of foreclosure and sale for the purpose of discharging the amount due on his mortgage, together with costs, imports a finding, that the liens or interests of all the defendants accrued subsequently to the plaintiff's mortgage. The complaint avers that such is the fact.

The judgment entered on the order of Justice White conflicts in this respect with the import of the decision of Justice Hoffman.

But if my brethren shall be of opinion that the question in regard to the regularity of the proceedings can be raised only by a motion to vacate them and not by appeal; that the fact, that the defendant Dempsey has not even on this appeal raised any question of regularity, is satisfactory evidence that she had notice of the application for the order of reference, and assented

to it, and admitted service of notice of hearing before the referee, and had notice of the settlement of the judgment by Justice White, and that such judgment in the intent of the parties is entered as well on the decision of Judge Hoffman as upon the subsequent proceedings,—then nothing will be left except the defendant's exception to the decision excluding evidence "that the promissory notes mentioned in the complaint were usurious, as set forth in the answer of the defendant Dempsey," and her exception to the first conclusion of law contained in the decision of Judge Hoffman.

With reference to the first exception, it is to be observed, that the only foundation laid for giving the evidence which the judge excluded is, first, the allegation in Dempsey's answer, "that she is the owner in fee of the premises" in question; and the admission at the trial, to wit, "the defendant Dempsey being admitted to be the owner of the mortgaged premises." What this admission was understood by Judge Hoffman to mean, is shown to some extent by the seventh finding of fact, viz.: "That at the time of filing such answer the defendant, Jane R. Dempsey, was and now is the owner of such premises." When or how she became such owner is not alleged in the answer, nor stated in the admission or in the findings of fact. But it is quite evident that her ownership accrued subsequent to the giving of the mortgage held by the plaintiff, and is subordinate to it, except in so far as the fact of usury exempts it from such subordination. The answer does not deny that Mrs. Dempsey's ownership was acquired with actual knowledge of the plaintiff's mortgage, nor does it affirm that it is created by a deed containing any covenants of warranty.

Unless it be law that a court of equity, on a given state of facts, will permit proof of usury as a defence and flat bar, when it could not grant any relief to the same party on a bill filed by him to obtain relief from the same usurious transaction (a question which will be considered hereafter), then it seems to me that *Post v. Bank of Utica* (7 *Hill*, 391) is an authority in support of the decision at special term. The respondents, the Bank of Utica, had become owners of the mortgaged premises by a purchase of them at a sheriff's sale on a judgment and execution against the mortgagor. They thereby acquired all the title which any deed from the mortgagor could have conferred.

Chamberlain *a.* Dempsey.

Whether a conveyance by the mortgagor with warranty of title (Cole *a.* Savage, 10 *Paige*, 583-592) would confer rights to contest the mortgage, which a quit-claim deed or a purchase "of the mere equity of redemption" would not confer, may, possibly, be a material question. But it is quite clear that in *Post a.* Bank of Utica, the decision of the chancellor was reversed, and his decision in *Cole a. Savage* (*supra*) was disapproved.

In *Green a. Kemp* (13 *Mass.*, 515), the defence of usury was excluded. The defendant was the mortgagor's grantee of "all the right in equity, of redeeming, which he (the mortgagor) had in the premises." In *Sands a. Church* (6 *N. Y.*, 347), the defence was excluded on the ground that the defence of usury had been waived by those having a right to waive it, before the title of *Daily*, one of the appellants, had accrued. *Church*, the other appellant, was one of the parties waiving it.

Hence, unless the admission made at the trial, that the defendant *Dempsey* "is the owner of the premises" in question, imports more than that she had succeeded to the title which the mortgagor had, subject to the mortgage, then it does not appear that she had any conveyance given in hostility to the mortgage. It, of course, does not mean that she has title free from all incumbrances. It could not have been understood by *Dempsey*, the plaintiff, or the court, as admitting that her title was paramount to that of *Platt* and *Delaplaine* as mortgagees.

In my view, the important question upon the merits is resolved into the consideration whether the fact as admitted or found, in regard to *Dempsey's* ownership, imports that her title is in hostility to the mortgage? If it imports that, then I think the decision is erroneous, otherwise not.

A party sued at law on a usurious security, if able to prove usury, succeeds in his defence. The contract and securities being declared void by statute; it would seem to follow, that whether the action was at law upon the contract, or in equity to enforce the security, the contracting party in the former, or in the latter case the party owning the incumbered property, or having a valid lien upon it by mortgage or execution, is entitled to the defence as a matter of strict right, if possessed of evidence to establish it. In this view the decisions do not present the actual conflict imputed to them. *Jackson a. Dominick* (14 *Johns.*, 435); *Dix a. Van Wyck* (2 *Hill*, 552); and *Post a. Dart* (8 *Paige*, 639),

are not in conflict with *Post v. Bank of Utica* (7 *Hill*, 391). Prior to the Revised Statutes, if a borrower was obliged to resort to a court of chancery to obtain a discovery of evidence to establish the usury, he was obliged to offer to pay the sum lent and interest, and could only obtain relief from the usurious excess. Those statutes did not relieve him from the necessity of offering to pay the principal. (*Livingston v. Harris*, 11 *Wend.*, 329.) And in *Post v. Bank of Utica* (7 *Hill*, 391), the question was, whether the respondent was one of the persons authorized by statute to seek relief by bill in equity.

Holding that he was not, does not necessarily decide that if a party defendant, and able to prove the usury, he might not allege and prove it as a defence, although not within the statute specially authorizing a bill for relief. In this view there is no necessary conflict between *Post v. Dart* (8 *Paige*, 639) and *Post v. Bank of Utica* (7 *Hill*, 391). In the former case the usury was set up as a defence, and the party had a strict legal right to allege and prove it.

In the latter case the respondent sought relief in equity under a particular statute, and he was held not to be within its provisions. Such a view does not involve the consequence which a learned senator, in the latter case (7 *Hill*, 413), denounced as "discreditable to the law,"—that "the success of the lender in recovering the money loaned would depend upon the court in which the litigation was carried on, rather than upon the law of the land." For in this view, usury as a defence, is equally available as a matter of strict right, in equity as at law. It is only when the borrower or his grantee of mortgaged premises, goes into a court of equity for affirmative relief as a plaintiff, that the question arises whether the latter is one of the persons authorized to file a bill.

On the whole, my mind is led to the conclusion that the effect of the admission made at the trial is, that the defendant Dempsey has all the ownership and right which the mortgagor was competent to grant. He could convey subject to the mortgage, and thus waive the usury and withhold from his grantee all right to avail himself of it. But he could also convey in hostility to it, in which case she could plead and prove it. By the terms of the admission made, it must be intended to mean that Dempsey's ownership is as perfect and absolute as it was com-

Chamberlain *v.* Dempsey.

petent for the grantor to make it, and in this view the decision of the judgment is erroneous, and the judgment should be reversed and a new trial granted.

When the defendant is put to proof of her title, all the doubts which now beset this branch of the case may be removed.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

ROBERTSON, J.—I entirely concur with the chief-justice in the view that the admission of an ownership in fee in Mrs. Dempsey, without any qualification, gave her the same right to set up the defence of usury against the mortgage sought to be foreclosed as was in her grantor.

The proceedings in the cause seem to be quite irregular. The trial of the issues of fact in the cause took place before one justice of the court, who decided, on the pleadings and evidence, "That the plaintiff was entitled to judgment of foreclosure and sale" of the premises to pay the amount due on the mortgage, but was "not entitled to a judgment for any deficiency." This decision being in writing was filed, but no judgment was entered upon it. (*Code*, § 267.) A judgment was however entered upon the order of a different justice, which does not refer to the first trial of the issues, but is made merely upon proof of service of the summons personally on all the parties, and the report of a referee before the decision upon the first trial, upon a previous order made by still a third justice to compute the amount due on the mortgage. Such order on its face seems to have been made without notice of the application for it to, or appearance at the making of it by, the defendant, Mrs. Dempsey, and the referee's report does not recite her as appearing.

As these proceedings stand, the plaintiff first obtained a computation of the amount due against the defendants; then tried the action and obtained a decision against her on questions of law, but without any order of reference to compute the amount due against her; and finally entered a judgment against her for a sale to discharge the amount reported due by the referee against others.

The power of a court to order a reference is found in section 271 of the Code; which in its second subdivision provides that it may be done, either before judgment or afterwards, for carry-

ing the judgment or order into effect, where the taking of an account shall be necessary for the information of the court. It is very plain in this case, that the order of reference actually made was as void as against Mrs. Dempsey, as though damages were assessed in an action for assault and battery, before the issues were tried, since the plaintiff proceeded to try the issues as against her afterwards. I do not see how under the decision of *Lawrence v. Farmers' Loan and Trust Co.* (15 *How. Pr.*, 57), any judgment could have been rendered on the decision at the trial at all, because there was no order of reference directed by it to compute; as even with that there could be no judgment until the computation was made and all questions upon it disposed of. Section 280 of the Code provides that "the judgment" shall be entered in the judgment-book, and shall specify clearly the relief granted, or other determination of the action. Until every thing is done required by the decision of a single judge, to furnish materials for a judgment, any entry upon such decision must be a mere order. The act, therefore, of the justice who made the final order for judgment was not a mere formal matter, but was the giving of judgment upon the decision of the judge who tried the cause and a report of a referee not made upon an order included in the decision on the trial.

As the appeal is from the judgment, I think this was not only an irregularity, but an error. It would be an irregularity in so far as it was made without the presence of, or notice to, the attorney of Mrs. Dempsey. But it is error to pronounce judgment upon an incomplete decision upon a trial, without any evidence of the amount due, and upon a report which as to Mrs. Dempsey was an absolute nullity.

Even if it were possible that the order of reference to compute had been made after the trial, I do not think the matter would be mended. I do not see how any judge but the one who tried the issues could issue an order for computation. He was bound to furnish all the means of determining the relief to be granted by his decision, for otherwise it would be impossible to ascertain how far the making of such an order would have modified his decision.

I think the practice of ordering a computation after the decision of a case ought not to be encouraged, and indeed it may be very doubtful if it can be done unless an account is to be

taken ; a mere computation might as well be made at the trial as after.

I think, therefore, the decision of the judge who tried the action, was too incomplete to allow a judgment to be entered upon it by himself or any other judge. That no order of reference to compute the amount due could therefore be made as regarded Mrs. Dempsey, before or after such trial by any other judge. That the judgment was entered without a trial and decision that would warrant it, and that the judgment should be reversed as regards Mrs. Dempsey.

Whether the decision of the judge who tried the cause can now be amended so as to add to it an order to compute, and a new judgment be entered thereon, is not a matter now to be decided. But I think if that can be done, and the amendment be considered as made, then the error on the trial as to the merits before referred to is sufficient to reverse the judgment.

The judgment should therefore be reversed and a new trial granted, the costs to abide the event.

MONCRIEF, J.—The defendant, Jane R. Dempsey, alleged in her answer as a defence to the action, that she was the owner in fee of the mortgaged premises, and that the notes to secure the payment of which the mortgage was executed and delivered to the plaintiff, were usurious. This, if proven, was a good defence. (*Green v. Kemp*, 13 *Mass.*, 515.) *Dix v. Van Wyck* (2 *Hill*, 526), cites the case and states, "It was admitted that if Kemp had purchased the land and not the equity of redeeming, though with notice of the mortgage, he might have set up the usury. Kemp was not permitted to set up usury in the mortgage, for the reason that he had no title to the land."

In 7 *Hill*, 406 (on appeal from 8 *Paige*, 640), the question discussed is, Whether a purchaser at a sheriff's sale under an execution is a "borrower" within the meaning of the statute ; and it is held he is not.

Sands v. Church (6 *N. Y.*, 347), affirmed the judgment below, on the ground that the appellant "could not on the facts presented in that case avail himself of the defence relied upon ;" and it appeared that the defendant (appellant) purchased subject to the mortgage. He was, therefore, the owner of the equity of redemption only. *De Wolf v. Johnson* (10 *Wheat.*, 367), presents

Bingham *a.* Disbrow.

the case of a third person, the assignee of an equity of redemption, setting up the defence. The learned justice at the special term erred in excluding the defence interposed by Mrs. Dempsey; it being admitted upon the trial that she was the owner of the premises, she had title and could set up the usury.

The judgment should be reversed, and a new trial ordered.

BINGHAM *a.* DISBROW.

Supreme Court, First District; General Term, March, 1862.

RESIDENCE OF DEBTOR AND OF JUSTICE IN SUPPLEMENTARY PROCEEDINGS.—VOLUNTARY APPEARANCE OF THE DEBTOR.—VALIDITY OF RECEIVER'S APPOINTMENT.

The portion of section 292 of the Code, which provides for the examination of a judgment-debtor, when an execution issued to the sheriff of the county where he resides has been returned unsatisfied, refers to the county where he resides at the issuing of the execution.

Any justice of the Supreme Court may make an order, under section 292 of the Code, for the examination of a judgment-debtor, without regard to the residence or location of the justice. But the debtor must be directed to appear in the particular county prescribed in that section.

An order for the appointment of a receiver, under section 298 of the Code, founded on the voluntary appearance and examination of a judgment-debtor, is valid. It is only when a judge or court has no jurisdiction of the subject-matter of the proceeding in which an order is made, that the order is wholly void for want of jurisdiction.

Appeal from a judgment.

This action was brought by Charles K. Bingham, receiver &c., of Alfred Disbrow, a judgment-debtor, against Alfred Disbrow, William Strang, Bethia E. Disbrow, and James A. Disbrow, administrator, &c., of Stephen R. Disbrow, to set aside a transfer by Alfred Disbrow, the judgment-debtor, and by William Strang, his assignee, of his distributive share in the estate of Stephen R. Disbrow, his deceased brother. The judgment-debtor sold his interest in the estate to Strang, for three notes of Strang of \$300 each. Strang subsequently sold this interest to his

*Reversed
5 Grand. App.*

Bingham *a.* Disbrow.

sister, Mrs. Bethia E. Disbrow, who was the wife of Alfred. Mrs. Disbrow gave for this interest the three notes of Strang, which she had received from her husband in payment of \$1000, claimed to be due to her from her husband.

In November, 1852, one Chauncey S. Martin recovered judgment against Alfred Disbrow and one Wheeler. At that time Alfred Disbrow lived in the county of Tompkins, and to that county an execution upon this judgment was issued. Subsequently Alfred Disbrow removed to Cayuga county. In December, 1855, the judgment-creditor procured from Hon. Theron R. Strong, justice of the Supreme Court in the Seventh Judicial District, an order for the examination of the debtor in supplementary proceedings. The affidavit of the creditor and order of the justice were as follows:

(TITLE OF THE CAUSE; AND VENUE.)

"Chauncey S. Martin, being duly sworn, says—That he is the above-named plaintiff, that judgment was recovered in this action against the above-named defendants in the Supreme Court, in and for the first judicial district, on the 15th day of November, 1852, for the sum of four thousand five hundred and thirty-three dollars and seventy cents, damages and costs, and the judgment-roll filed in the office of the clerk of the city and county of New York; that an execution against property of the judgment-debtor, Alfred Disbrow, was, on the 15th day of November, 1852, duly issued to the sheriff of the county of Tompkins; that the judgment-debtor, Alfred Disbrow, resided in said county at the time of issuing such execution, and now resides near Port Byron, in Cayuga county, and that the said sheriff has returned the said execution unsatisfied, on the 23d day of January, 1853, and that the said judgment-debtor, Alfred Disbrow, has property which he refuses to apply to the payment of said judgment."

(JURAT; AND SIGNATURE.)

"It appearing to me by the affidavit of Chauncey S. Martin, the plaintiff, that an execution against the property of Alfred Disbrow, one of the defendants in the above-entitled action, has been duly issued to the sheriff of the proper county, upon the judgment herein, and returned unsatisfied, I do hereby require the said Alfred Disbrow to appear before me, Campbell W. Haynes, Esq., at his office in Port Byron aforesaid, on the 3d day of January next, 1856, at ten o'clock in the forenoon of that

Bingham *a.* Disbrow.

day, and on such further and other days, and at such times and places as this court or its referee, appointed herein, may by adjournment order and direct, to make discovery on oath concerning his property, and in the mean time, and until further order of this court, the said Alfred Disbrow is hereby enjoined and restrained from making any transfer or other disposition of his property not exempt by law from execution, or from any interference therewith."

(DATE; AND SIGNATURE.)

The judgment-debtor appeared before the referee and was examined concerning his property, and in March, 1856, Mr. Justice Strong appointed, without notice to Disbrow, the present plaintiff receiver of the debts, property, equitable interests, and things in action of the judgment-debtor, and requiring security, which the receiver filed as directed in the order of appointment.

This action was tried before Mr. Justice Sutherland at special term, on the 18th day of April, 1859. Judgment was rendered for the plaintiff, and the defendants took the present appeal.

Bogardus & Brown, for the appellants.—I. The plaintiff must show himself to have been duly appointed receiver, having authority to bring this action. The court should have jurisdiction, and facts in support thereof must be alleged and proved. (*Sackett a. Andross*, 5 *Hill*, 327; *Van Etten a. Hurst*, 6 *Ib.*, 311; *Ford a. Babcock*, 1 *Den.*, 158; *Maples a. Burnside*, *Ib.*, 332; *Varnum a. Wheeler*, *Ib.*, 331; *Barker a. Johnson*, 4 *Abbotts' Pr.*, 435.) The affidavit upon which the order supplemental to execution was granted, was insufficient, and gave no jurisdiction. 1. It nowhere appears that a transcript of the alleged judgment was ever filed in the county (Tompkins) to which the execution was issued, which is all essential to the right to issue execution to the sheriff of that county. 2. The execution should have been issued to the sheriff of the county where Disbrow resided at the time the order for his examination was granted. Even if the order was granted under subdivision 2 of section 292, the affidavit is insufficient. 1. It does not show that defendant Disbrow resided in the county where the judge or officer resided; but the court will take judicial notice that the residence of the judge who made the order was in Monroe county. 2. The same preliminary proofs or requisites are necessary under

Bingham *a.* Disbrow.

subd. 2 as are required under subd. 1, except the return of the execution, or subd. 2 would be unmeaning, and an order can be granted without a judgment or proof of judgment, or the judgment may be for less than \$25, or there may not have been a transcript filed to warrant an execution. (Sackett *a.* Newton, 10 *How. Pr.*, 560.) 3. The affidavit contains no proof that the judgment-debtor had property which he unjustly refused to apply towards the satisfaction of any judgment. 4. Subd. 2 requires the same state of facts as subd. 1, excepting only the return of execution. These are questions not as to regularity, but go to the jurisdiction. (Sackett *a.* Newton, *supra*.)

II. The receiver was irregularly appointed, even if the justice had jurisdiction to make the order for examination. 1. The defendant Disbrow was entitled to notice of application for appointment of a receiver. (Barker *a.* Johnson, 4 *Abbotts' Pr.*, 435; Kemp *a.* Harding, 4 *How. Pr.*, 178; Dorr *a.* Noxon, 5 *Ib.*, 29; Corning *a.* Tooker, *Ib.*, 16.) 2. It nowhere appears that no other proceedings supplemental to execution were pending when the order was made appointing plaintiff a receiver, or that, if so, the plaintiff in those proceedings had notice. (*Code*, § 298.) 3. There may have been a receiver previously appointed, and if so, the plaintiff has no authority to act, and should he sustain this action, the defendants may be under the necessity of defending another action by a receiver previously appointed.

William Norton and *Levi S. Chatfield*, for the respondent (after considering the merits).—I. The validity of the order appointing the plaintiff receiver, is not traversable in this action. Unless it is void it cannot be attacked collaterally. The justice had undoubted authority to issue the order for the examination of the defendant in the judgment, on the affidavit made. He did issue it, it was served, and the defendant appeared and was examined. Section 292 of the Code contemplates but one execution, returned *nulla bona* prior to the order supplemental; no matter what changes of residence may have intervened, if the execution in the first instance is sent into the proper county. It is simply a substitute for the creditor's bill, which might always be filled on one return of *nulla bona*. Any other rule would render the remedy nugatory, for the debtor could avoid

the examination by a removal once in sixty days. No question of jurisdiction is involved, for the jurisdiction of this court to issue these orders is general. If the court has misjudged as to the propriety of issuing the order in a particular case, it is an irregularity to be corrected on motion: it does not vitiate the adjudication. (*Lindsey a. Sherman*, 1 *Code R.*, 25; *Conway a. Hitchins*, 9 *Barb.*, 378.)

II. But the receiver is an officer of the court, and the order of appointment alone is a sufficient authority for him to commence the action. Jurisdiction and regularity will both be presumed in support of an adjudication of a court of general jurisdiction.

III. An examination on supplemental order was not necessary to authorize the appointment of a receiver. This may be done by the court whenever an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment. (*Code*, §§ 244, 298.) The affidavit in this case alleged that the defendant had so refused. (See *People a. Hulbert*, 1 *Code R.*, 75.) If the defendant was dissatisfied with the order of Judge Strong, he should have moved to set it aside; he cannot attack it collaterally.

BY THE COURT.*—INGRAHAM, P. J.—The plaintiff was appointed receiver of a debtor under supplementary proceedings.

The affidavit showed that the execution had been issued in a county where the debtor resided when so issued, which was three years previous, but it appeared that the debtor had afterwards removed to another county.

To warrant such proceedings, it is undoubtedly necessary that an execution should be issued to the county where the debtor resides, before the order for his examination can be made. The question arises, whether this refers to the time of the issuing of the execution, or of the application to the judge. At the hearing of this appeal I was inclined to think the affidavit in this case defective, but on more examination, I have come to a contrary opinion. The words of the statute (*Code*, § 292) are, "When an execution, &c., issued to the sheriff of the county where he (the debtor) resides, is returned unsatisfied, &c." The

* Present, INGRAHAM, P. J., CLERKE and LEONARD, JJ.

proper construction of this is, I think, to apply the residence to the time of issuing the execution. The words throughout are in the present tense: "when an execution issued to the sheriff of the county where the debtor resides" only applies to the issuing of the execution; and the residue of the sentence, "is returned unsatisfied," also being in the present tense, also applies the residue of the sentence to the execution when issued, and to an occurrence necessarily past. The moment this has occurred, viz., the issuing of the execution to the sheriff of the county where, at the time, the debtor resided, and its return unsatisfied, the plaintiff was entitled to an order from a judge of the court for the examination of the debtor. All the facts necessary to give the judge jurisdiction at the time existed. I am of the opinion that the debtor could not, by his act, deprive the creditor of the right to the order for his examination by changing his place of residence. If he could do so, then it is in the power of a debtor to defeat, at all times, his creditor. He has only, during the running of the execution, to cross the boundary-line into another county and reside there, thus to defeat his creditor.

I do not think the statute requires any such construction, but, on the contrary, that the requirements of the statute are satisfied when the execution has been issued to the county where the debtor resided at the time of the issue thereof, and that the subsequent change of residence by the debtor does not defeat the creditor's proceeding.

The order must require the debtor's appearance in the county to "which the execution had been issued." That county was the one in which the debtor resided when the execution was issued. So far as the jurisdiction of a judge of the Supreme Court to make the order was involved, the residence of the debtor at the time of issuing the order was immaterial. Any judge of this court may make an order for the examination of the debtor before himself, in the county to which the execution against a debtor had been issued. The jurisdiction of the judge does not depend upon his residence or his location at the time of the making of the order. As his powers are coextensive with the State, so his authority to make this order extends throughout the State, irrespective of the debtor's residence. I do not refer to the place where he is to direct the examination to take place; that is directed by the statute to be in a particular county.

If he is not to be in such county, he has power to direct the examination to be before a referee, under section 300.

I think, therefore, there was no want of jurisdiction in this case in the judge by whom the first order was made.

The affidavit showed all that was necessary to confer jurisdiction in the first instance, and such jurisdiction was not affected by the subsequent removal of the debtor to another county after the execution had been returned.

I am also of the opinion that the defendant cannot raise this objection to the proceedings in this action. The debtor appeared and was examined, and such examination, without objection on his part, was a waiver of the irregularity, if any. I concur with DUER, J., in *Viburt a. Frost* (3 *Abbotts' Pr.*, 119), where he says: "The appearance and submission to examination must be regarded, if the order was null, as voluntary acts. And it cannot be reasonably doubted that a valid order for the appointment of a receiver may be founded upon a voluntary appearance and examination of the judgment-debtor. It is only when a judge or court has no jurisdiction of the subject-matter of the proceeding in which an order is made, that the order is wholly void for want of jurisdiction. It is to such cases that the maxim, 'Consent cannot give jurisdiction,' applies. In all other cases the objection to the jurisdiction may be waived.

"Here the general authority of the judge to make the order appointing a receiver—in other words, his jurisdiction over the subject-matter of the order—was unquestionable."

So, in *Dudley a. Mayhew* (3 *N. Y.*, 9), it is said that an assent of the parties cannot give jurisdiction in a matter over which it has not by law cognizance. (See, also, *Tyler a. Willis*, 33 *Barb.*, 327.)

I would add, also, that the like jurisdiction over the person of the debtor, under a proper affidavit, was likewise beyond dispute. To hold the reverse of these propositions would virtually destroy the whole intent of the Legislature in this portion of the Code.

If a debtor may, by secretly removing from the county while the execution is running, and afterwards submitting to an examination and the appointment of a receiver without objection, defeat any action brought by such receiver for such reasons, these provisions can be rendered nugatory.

Matter of Cavanagh.

I am of the opinion that the appointment of the receiver was valid, and cannot be affected by this objection to the jurisdiction in the present action.

Judgment affirmed, with costs.

MATTER OF CAVANAGH.

Supreme Court, First District; General Term, March, 1862.

PARTITION OF REAL PROPERTY BY PETITION.—RELEASE OF PURCHASER AT JUDICIAL SALE.

A purchaser at a sale by order of court will not be required to complete his purchase, in case of reasonable doubt as to the validity of the title acquired.

After a sale of land under proceedings in partition, instituted by petition pursuant to 2 Rev. Stat., 317, § 1, the purchaser objected to the title, on the ground that such proceedings were abolished by the Code. *Held*, that he should not be compelled to complete his purchase.

Appeal from an order, requiring a purchaser at a sale in partition to complete his purchase, and accept deed.

This was a proceeding instituted by George W. Cavanagh, Sarah Foster, and Samuel Foster, by petition to the Supreme Court, under 2 Rev. Stat., 317, § 1, for the partition of a lot of land with dwelling-house in Fifty-first-street, New York city. A special guardian was appointed for certain infant owners of three-fifths of the property. Three commissioners were appointed to make the partition. The commissioners reported that the property, in their judgment, was not capable of actual partition; whereupon an order was made for a sale of the premises.

On such sale Timothy Donovan became the purchaser, and paid the usual deposit. After an examination of the title, Donovan declined to complete his purchase, on the ground of alleged informalities in the proceedings; but mainly on the ground that proceedings for partition under the Revised Statutes by petition were abolished by the provisions of the Code.

The petitioners applied to the court for an order requiring Don-

ovan to accept the deed, and pay the purchase-money; and such order was granted. The purchaser appealed.

Bogardus & Brown, for the appellant.—I. A purchaser is never compelled to accept a doubtful title. (See cases cited, 11 *Abbotts' Pr.*, 444.)

II. Justice Pratt, in *Croghan v. Livingston* (17 *N. Y.*, 218; S. C., 6 *Abbotts' Pr.*, 350), pronounces the proceeding by petition under the Revised Statutes “*abolished*,” and the proceedings by summons and complaint the “only existing form of remedy for a partition.” This opinion is carefully studied, the point in question thoroughly argued, and the conclusion positive and undoubted.

III. The cases of petition in 3 and 4 *How. Pr.*, were under the Code of 1848, which expressly excepted the chapter of the Revised Statutes relative to partitions from the operation of the Code. This exception was not continued in the Code of 1849, but instead thereof a new chapter providing for partitions was added to the Code. Section 468 of the Code provides that “all rights of action given or secured by existing laws may be prosecuted in the manner provided by the Code.” By the same section, it is only in cases “in which an action for the enforcement or protection of a right, or redress or prevention of a wrong, cannot be had under this act,” that “the practice heretofore in use may be adopted.”

IV. A petition is an “ordinary proceeding in a court of justice ‘prosecuted for the enforcement of a right;’” it is therefore an “*action*” under the very definition of the Code (§ 2), and by § 6 is a civil action. (See *Myers v. Rasback*, 4 *How. Pr.*, 83.) By § 127, civil actions in courts of record shall be commenced by summons, which must be served on the parties. Infants must appear by guardian (§ 115); and if over fourteen years of age, the guardian is to be appointed on the infant’s application, within twenty days after service of summons; otherwise on the application of other parties. As none of the steps prescribed by the Code have been taken, no jurisdiction was ever acquired over the three infant defendants, and their three-fifths of the property is not affected by the decree.

V. The proceedings are irregular and defective even under the Revised Statutes alone.

VI. There has not been any such frequency of proceeding

since the Code of 1849, as to furnish any reason for disregarding the plain intent of the Code. All the cases of partition we have found reported since 1849 have been by summons and complaint, with one exception, in which no notice was taken of this point. Even under the Code of 1848, Justice Harris thought "a summons and complaint the only proper form of procedure." (*Backus v. Stilwell*, 3 *How. Pr.*, 318. See *Myers v. Rasback*, 4 *Id.*, 83; *Row v. Row*, *Id.*, 133; *Northrop v. Anderson*, 8 *Id.*, 351; *Ripple v. Gilborn*, *Id.*, 456; *Brownson v. Gifford*, *Id.*, 389; *Lyle v. Smith*, 13 *Id.*, 104; *Blakely v. Calder*, 15 *N. Y.*, 617; affirming *S. C.*, 13 *How. Pr.*, 476; *Canfield v. Ford*, 16 *Id.*, 473; *Hyatt v. Pugsley*, 23 *Barb.*, 285, 303; *Noble v. Cromwell*, 26 *Id.*, 475; *S. C.*, 6 *Abbotts' Pr.*, 59; *Jennings v. Jennings*, 2 *Id.*, 6; *Disbrow v. Folger*, 5 *Id.*, 53; *Waring v. Waring*, 7 *Id.*, 472.) There is no difficulty about making title under a new action for partition, or under a foreclosure of the mortgage on the premises, either of which can be done at far less expense and far less delay than would be necessarily incurred in getting a final determination in the courts of the question whether the remedy still exists. Under a decision of the general term adversely to the purchaser on this motion, the purchaser would not be safe in taking the title; for if the Court of Appeals should hereafter decide in any future case in accordance with Justice Pratt's opinion, the present purchaser might be immediately ejected by the infants.

Charles D. Miller, for the respondent.—I. The objection that the proceeding by petition is abolished, was not before the court in *Croghan v. Livingston* (17 *N. Y.*, 218; *S. C.*, 6 *Abbott's Pr.*, 350); and hence that case is not authority here. That opinion, if followed, will unsettle many titles. Many cases have occurred where the proceeding was by petition, including one reported case. (*Alvord v. Beach*, 5 *Id.*, 451.) A statute of this nature should not be abolished by mere implication, and far too much property has been disposed of to admit of it. It would do violence to the rights of too many innocent purchasers. In the case of *Croghan v. Livingston*, when before this court at general term (25 *Barb.*, 336), no intimation will be found that the proceeding by petition had been abolished, but the justices appear to have entertained a contrary view.

Matter of Cavanagh.

BY THE COURT.*—CLERKE, J.—I think it would be contrary to that caution upon which we have always acted in relation to applications of this kind, to compel the purchaser in this case to complete his purchase.

There seems to be a considerable diversity of opinion whether a partition of real property can now be effected by a petition.

According to the opinion of Mr. Justice Pratt, in *Groghan v. Livingston* (17 *N. Y.*, 218; S. C., 6 *Abbotts' Pr.*, 350), this mode of proceeding is abolished. He deems the proceedings by summons and complaint the only existing form of remedy for partition. This might be considered a dictum, not having been necessary to the decision of the question before the court at the time. But the point seems to have been carefully considered by the judge, and his opinion is unhesitating and unqualified. The same opinion has been expressed by other judges, and it is a very prevalent one in the profession. Without venturing now to say that it is well founded, the doubts referred to make it safer and more in conformity with our usual course, not to compel the purchaser under such circumstances to complete his purchase. I think the order should be reversed, the purchaser relieved, and his deposit repaid.†

* Present, INGRAHAM, P. J., LEONARD and CLERKE, JJ.

† On a subsequent application by the purchaser in the same proceeding, *At Chambers*, April, 1862, the petitioners were ordered to pay the costs and expenses of the purchaser, and that such costs and expenses, on being ascertained, should be charged upon the petitioners' interest in the land, and that the purchaser have execution therefor.

Bogardus & Brown, for the motion, cited 2 *Paige*, 586; 3 *Edw.*, 69; 6 *Beav.*, 97.

Charles D. Miller, opposed.

CLERKE, J., ordered that it be referred to Maurice Leyne, Esq., to ascertain the costs and expenses of the purchaser, and report the same; that the petitioner pay the purchaser or his attorney, upon the confirmation of the report, the amount so ascertained; that an execution might be issued therefor, or that the same might be paid from any proceeds of said premises belonging to the petitioner upon any sale that might thereafter be made under the order or direction of this court.

SMITH *a.* MEAD.*Supreme Court, First District; General Term, March, 1862.*

FRIVOLOUSNESS OF A PLEADING.

To warrant striking out a pleading as frivolous, it must be clearly bad on inspection merely.

In an action upon a negotiable instrument, an answer that the plaintiff, prior to the commencement of the action, for a good consideration, sold and delivered the notes to *John Doe*, who was the owner and holder of the note at the commencement of the action, is not frivolous.

Appeal from a judgment upon an answer as frivolous.

This was an action upon two promissory notes made by the defendants, payable to their own order, and by them indorsed and delivered to the plaintiff. The answer was as follows:

(TITLE OF THE CAUSE.)

"The defendants, for answer to the complaint of the plaintiff in this action, say—

"They admit that heretofore they executed and delivered two promissory notes to the plaintiff, but the defendants deny, on information and belief, that the description of said notes, as set forth in the complaint, is a true description of said notes, or correctly states the terms thereof.

"Defendants, further answering, deny, on information and belief, that the plaintiff is now, or was at the time of the commencement of this action, the lawful and *bona-fide* owner and holder of the promissory notes mentioned in said complaint, or either of them; and, on information and belief, they deny that said plaintiff has any interest in either of said notes whatever, and, on information and belief, defendants aver, that prior to the commencement of this action said plaintiff sold and delivered said notes for a valuable consideration to one John Doe; and, on information and belief, they aver, that the said John Doe is and was, at the time of the commencement of this

action, the lawful owner and holder of said notes. Wherefore the defendants demand that said complaint be dismissed with costs."

(SIGNATURE AND VERIFICATION.

On plaintiff's motion, judgment was given by Mr. Justice Barnard upon the answer as frivolous. The defendants appealed.

Ranken & Reavey, for the appellants.—I. The answer denies that plaintiff is the lawful owner and holder of the notes complained of. It is the denial of a material allegation, and is, therefore, not frivolous. (*McKnight a. Hunt*, 3 *Duer*, 615; *Davis a. Potter*, 4 *How. Pr.*, 155; *Lord a. Chesebrough*, 4 *Sandf.*, 696; *Caswell a. Bushnell*, 14 *Barb.*, 393.)

II. The objection to the entire "answer," as frivolous, should have been taken by demurrer, and not otherwise. (*Hull a. Smith*, 8 *How. Pr.*, 149.)

III. If the answer denies a material allegation of the complaint, it is not frivolous. (*Hull a. Smith*, 8 *How. Pr.*, 149; *Edson a. Dillaye*, 8 *Ib.*, 273; *Davis a. Potter*, 4 *Ib.*, 155; *Hecker a. Mitchell*, 5 *Abbotts' Pr.*, 453; *Lord a. Chesebrough*, 4 *Sandf.*, 696; *Temple a. Murray*, 6 *How. Pr.*, 329.)

IV. The denial of any interest of plaintiff in the notes, coupled with the allegation of the transfer of said notes, was a sufficient cause of defence to put plaintiff on his proof. (*Lord a. Chesebrough*, 4 *Sandf.*, 696; *Snyder a. White*, 6 *How. Pr.*, 321; *Temple a. Murray*, *Ib.*, 329; *Sherman a. Bushnell*, 7 *Ib.*, 171; *Brown a. Ryckman*, 12 *Ib.*, 313; *Flood a. Reynolds*, 13 *Ib.*, 112; *Met. Bank a. Lord*, 1 *Abbotts' Pr.*, 185; *Hecker a. Mitchell*, 5 *Ib.*, 453.)

V. The allegation that plaintiff sold the notes and transferred all his interest in them before the commencement of the action, clearly negatives the right of plaintiff to recover, and is sufficient to put him on his proof. If such averment is considered new matter, but insufficient to constitute a defence, the remedy was by demurrer, and not as taken. (*Kneedler a. Sternbergh*, 10 *How. Pr.*, 67; *Stewart a. Travis*, *Ib.*, 148.)

VI. If by the answer there is a doubt of the plaintiff's right to recover upon the pleadings as framed, the court will not and ought not to adopt the stringent, summary mode of giving judg-

Smith *a.* Mead.

ment, by striking out, or giving judgment upon, a pleading as frivolous. (*Temple a. Murray*, 6 *How. Pr.*, 329; *Rae a. Washington Mut. Ins. Co.*, 1 *Code R., N. S.*, 185.)

VII. If the defence set up by the answer is not so glaringly insufficient that the court can determine its frivolousness upon a bare inspection, without argument, the answer should not be adjudged to be frivolous. (*Nichols a. Jones*, 6 *How. Pr.*, 355; *Lefferts a. Snediker*, 1 *Abbotts' Pr.*, 41.)

Phelps & Knevals, for the respondent.—I. The denials in the answer are insufficient and defective as to form. The defendants “deny, on information and belief,” &c. *Thorn a. N. Y. Central Mills* (10 *How. Pr.*, 19), holds that “the construction of the amended section (*Code*, § 149) now is, that the defendant must deny absolutely, without any qualification whatever, unless he can deny that he has either knowledge or information sufficient to form a belief. When he cannot do this, or when he has knowledge or information and has formed a belief, he must deny positively; for he cannot traverse the allegation now except in one of two modes.” (See also *Elton a. Markham*, 20 *Barb.*, 343; *Hacket a. Richards*, 3 *E. D. Smith*, 13; *Walker a. Hewitt*, 11 *How. Pr.*, 395.) And if the defendants wished to rebut the presumption of bad faith, they should have supported their answer by a special affidavit showing the grounds on which their information and belief were founded. (*The People a. McCumber*, 15 *How. Pr.*, 186.)

II. The denial that the plaintiff is the lawful owner and holder of the notes, is immaterial and frivolous. There is no such allegation in the complaint, nor is it necessary. (*Flammer a. Kline*, 9 *How. Pr.*, 215; *Edson a. Dillaye*, 8 *Ib.*, 273; *Seeley a. Engell*, 17 *Barb.*, 530; *Witherspoon a. Van Dolar*, 15 *How. Pr.*, 266; *Catlin a. Gunter*, 1 *Duer*, 253; *Fleury a. Roget*, 5 *Sandf.*, 646; *Gilbert a. Covell*, 16 *How. Pr.*, 34; *De Santes a. Searle*, 11 *Ib.*, 477.) Nor is the allegation aided by pleading a transfer to “John Doe.” 1. “John Doe” is the conventional legal fiction, and means anybody or nobody. 2. But it would not help the matter if a transfer to an actual living person was charged in the answer. (*Witherspoon a. Van Dolar*, 15 *How. Pr.*, 266; *Brown a. Ryckman*, 12 *Ib.*, 313.)

III. Under section 247, the court has ample power to order

judgment absolutely for the plaintiff. (Witherspoon *v.* Van Dolar, 15 *How. Pr.*, 266.)

BY THE COURT.*—INGRAHAM, J.—It has been repeatedly held in this court, that an answer simply denying that the plaintiff is the lawful owner and holder of a note on which the action is brought, is bad. Such an answer at the present day is considered frivolous. The present answer, however, goes further, and avers that the plaintiff, prior to the commencement of this action, for a good consideration, sold and delivered the notes to a third person, who is named, and that he was, at the commencement of the action, the lawful owner and holder of the notes. We cannot say this answer to be frivolous. If the defendants should prove this on the trial, it would prevent a recovery by the plaintiff, unless he showed that the title to the note had again been vested in him. There is ground for supposing the defence a very doubtful one, but if not true, the remedy is by a motion to strike out the answer as false, on the plaintiff's affidavit. To warrant the court in striking it out as frivolous, it must be clearly bad on inspection merely, and not require an argument to convince the court thereof. If it is doubtful whether the answer is sufficient or not, it is not frivolous.

LEONARD, J., and CLERKE, P. J., concurred.

Order at chambers reversed, without costs, and without prejudice to a motion to strike out the answer as false.

* Present, CLERKE, P. J., INGRAHAM and LEONARD, JJ.

People *on rel.* Brownson *a.* The Marine Court of the City of New York.

PEOPLE *on rel.* BROWNSON *a.* THE MARINE COURT
OF THE CITY OF NEW YORK.

Supreme Court, First District; At Chambers, Nov., 1861.
Again, at General Term, March, 1862.

WRIT OF PROHIBITION.—RETURN.—JURISDICTION OF THE MARINE
COURT.—FRAUD IN ACQUIRING JURISDICTION.

A writ of prohibition issues only to restrain an excess of jurisdiction over subject-matter.

A writ of prohibition should not be issued to restrain an inferior court from proceeding in an action commenced by attachment, where the objection is that the attachment was irregularly issued, and upon insufficient affidavits.

Where a plaintiff severs and releases a portion of his claim in order to bring his cause within the jurisdiction of an inferior court, such severance and reduction should not be deemed a fraud upon the courts of higher jurisdiction so far as to authorize a writ of prohibition.

Where three actions were commenced in the Marine Court of the city and county of New York upon three several promissory notes for \$600, \$650, and \$600 respectively, the plaintiff claiming to recover only the amount of \$500 in each suit, in which actions the defendant, after objecting to the jurisdiction of the court on several grounds, set up in his answers three several counter-claims arising on contract, one for \$80, one for \$1,200, and the other for \$1,000, which answers were severally verified,—*Held*, that a writ of prohibition could not issue, as the Marine Court had jurisdiction of the subject-matter of the actions.

The limitation of jurisdiction as to matters of account prescribed by the Code (§ 54, subd. 4), if it ever applied to the Marine Court of the city of New York, has been taken away by Laws of 1853, ch. 617, which extends the jurisdiction of that court in certain cases, and regulates proceedings therein.

Where no facts are set forth in the return to an alternative writ of prohibition, an absolute prohibition does not issue of course.

I. *November, 1861.*—Application for an absolute writ of prohibition.

Samuel W. Slocum, one of the respondents, a resident of Brooklyn, in Kings county, began, on the ninth day of September, 1861, by attachment in the Marine Court of the city of New York against the relators, two of whom were also residents

People on rel. Brownson a. The Marine Court of the City of New York.

of Brooklyn, three suits on as many promissory notes made by them, and given to and held by him for \$600, \$650, and \$600, respectively. On the return of the attachments, the counsel for the relators, appearing specially for the purpose of objecting to the jurisdiction of the Marine Court, moved in that court to discharge them, on the ground that the affidavits on which they were based did not contain facts enough to give the court jurisdiction. The motion was denied, and the several actions were, by order of the court, set down for trial on the 24th of September.

The relators pleaded to the jurisdiction of the Marine Court in those actions on several grounds, and, without waiving these pleas, set up also in bar in each suit three counter-claims, one of \$80, one of \$1,200, and the other of \$1,000, making together an amount considerably larger than the aggregate claims of the plaintiff in the three suits. The answers were verified as the law requires. Affidavits were filed to establish these counter-claims, on the application at special term for the alternative writs of prohibition. Alternative writs of prohibition were granted by the court on the 23d of September, 1861, and were on the following day served on the Marine Court, and on the plaintiff in those suits. Before the filing of the returns to the writs, they were, by order, amended, so as to include the pleadings and proceedings in the court below. On the original and amended writs, and on the returns thereto, the relators moved, at special term, for absolute writs restraining the Marine Court and the plaintiff in the several suits from further proceedings therein.

The return to the writs, omitting formal parts, was as follows: "That the attachment in this action was duly issued out of this court on the 9th day of September, 1861, returnable on the 12th day of September. That the same was duly returned on said 12th day of September, personally served on the defendant James S. Brownson, with an inventory of the property of the defendants attached by the sheriff thereunder. That on the return-day of said attachment the defendants therein appeared by their counsel, Henry D. Sedgwick, and moved to dismiss the proceedings for want of jurisdiction, on account of the insufficiency of the plaintiff's affidavit, which motion was overruled. That no appeal has been taken from said decision, but, on the motion of the defendants, the trial of the case was adjourned to

People on rel. Brownson *a.* The Marine Court of the City of New York.

the 24th day of September, 1861, and the plaintiff was ordered to serve his complaint, and defendants to answer before that day. That upon the adjourned day the said action was called for trial, at which time the writ of prohibition was served. Whereupon, the trial of the action was adjourned to the 14th of October instant."

Henry D. Sedgwick, for the relator.—I. No material facts being set forth in the returns in answer to the alternative writs, an absolute prohibition should issue of course. (Commercial Bank *a.* Canal Commissioners, 10 *Wend.*, 25; People *a.* Ransom, 2 *N. Y.*, 490; People *a.* Commissioners of Fort Edward, 11 *How. Pr.*, 89; People *a.* Collins, 7 *Johns.*, 549; People *a.* Seymour, 6 *Cow.*, 579; Matter of the Trustees of Williamsburgh, 1 *Barb.*, 4.)

II. The affidavits on which the attachments were issued in the Marine Court were not sufficient to give that court jurisdiction. In denying the motions to discharge the attachments, the Marine Court has insisted on exercising unlawful jurisdiction. As no appeal now lies to this court, as formerly, it can only exercise its rightful authority over the subject-matter, in the form under which that authority is now invoked. (5 *East*, 345; *Bac. Abr.*, tit. *Prohibition*, art. *K.*, vol. 8, Penn. ed., 233; *Home a.* Earl Camden, 2 *H. Bl.*, 533.)

III. The "debt" in each case, in the Marine Court, exceeding \$500, and so appearing on the face of the application for the attachment, and of the complaint in that court, the Marine Court has not jurisdiction, notwithstanding that no demand is made for a judgment exceeding \$500. (*Code of 1849*, § 53, subds. 1, 4, § 65; *Laws of 1852*, 647, ch. 389, § 9; *Laws of 1853*, ch. 617, § 2; 3 *Black.*, 153; *Burrill's Law Dict.*, "Debt.")

IV. The bringing at the same time of several suits on like claims between the same parties, for so large an aggregate amount, in a court of special and very limited jurisdiction, instead of uniting them in one action in a higher court, is in fraud of the jurisdiction of the superior courts, and presents a case in which, by ancient and established practice, the writ should issue. (*Bac. Abr.*, tit. *Prohibition*, art. *K.*, 658, vol. 8, Penn. ed., 231; *Fitzherbert Natura Brevium*, 46 *A.*; 2 *Rolle*, 281, tit. *Prohibition*, *B.*, and cases cited; *Gerling a.* Alders, 2 *Keble*,

People on rel. Brownson *a.* The Marine Court of the City of New York.

617; S. C., 1 *Vent.*, 73; Savoy Court *a.* Stanford, 24 *C.*, 2, cited 1 *Vent.*, 65; Appo *a.* People, 20 *N. Y.*, 531.) If the principles claimed by the relators are not sanctioned by this court, and these suits are not restrained, there is a palpable evasion of the humane policy of the Legislature, which permits attachments against the property of residents only in specified cases of dishonesty and fraud, as well as of those provisions of the United States and State Constitutions, which declare that "no person shall be deprived of life, liberty, or property, without due process of law." (2 *Rev. Stat.*, 3; 3 *Ib.*, 5 ed., 79; *Code*, § 227, Cons. U. S., Amendts., art. 5; *Cons. N. Y.*, 1846, art. 1, § 5.)

V. Unless the prosecution of these suits, thus brought in evasion of the jurisdiction of the superior courts, is prohibited by this court, the relators, having valid counter-claims to the amount of \$2,280 which it is their duty to plead, will be deprived of the benefit of them, because their amount far exceeds the limits of the Marine Court's jurisdiction. (2 *Rev. L.*, 1813, 387, § 125; *Code of 1849*, § 64, subd. 4, 68; Appo *a.* People, 20 *N. Y.*, 531, 540, *et seq.*, 557; *Jac. Law Dict.*, tit., *Prohibition*; Derby *a.* Cozens, 1 *T. R.*, 552, 555, 556; approved by Court of Appeals in Appo *a.* People, case cited above; Leman *a.* Goulty, 3 *T. R.*, 3; *Lit. R.*, 163, cited in *Bac. Abr.*, tit. *Prohibition.*, vol. 8, Penn. ed., 228)

VI. The writ of prohibition was properly applied for upon the joining, and before the trial of the issues. When the several suits were brought, the attempt was already made to evade the jurisdiction of the higher courts. When the issues were joined, it was apparent that the Marine Court could not try them. The answers severally present a legal and complete defence, which upon its face the Marine Court had no jurisdiction to examine. By assenting to the prosecution of the several suits, and to the submission of these issues to the jurisdiction of that court, the relators might have waived their clear right to have the issues tried by the proper tribunal. (*Mendyke a. Stint*, 2 *Mod.*, 272, case 157; *French a. Trask*, 10 *East*, 34; Derby *a.* Cozzens, 1 *T. R.*, 562; *Byerley a. Windus*, 5 *B. & C.*, 21.)

Livingston K. Miller, for the respondents.—I. There is no limit now imposed by the statute as to the amount for which

People on rel. Brownson *a.* The Marine Court of the City of New York.

the Marine Court may entertain a suit. The only limit is as to the recovery. (*Laws of 1853, 1165, § 2.*)

II. The defendant is not bound to plead his set-off, if it exceeds the plaintiff's claim by \$50, but may bring suit therefor in any other court. (*Act of 1813, § 125; Davies' Laws of N. Y., 508.*)

III. The Supreme Court cannot presume in favor of defendants' alleged counter-claim, and by prohibition prevent the Marine Court from exercising jurisdiction; otherwise, sham counter-claims would destroy the jurisdiction of the inferior court in any case.

IV. As to the relator's points: 1. That it does not appear from the affidavit that a warrant could not issue. (*Laws of 1831, 396, § 33.*) In the case in hand, it appears affirmatively that the debt on which this action was founded was on contract for money lent to the defendants in their firm capacity; therefore no warrant could issue. 2. That the affidavit is defective in not stating that the plaintiff's claim is "over and above all discounts." (*Laws of 1831, 396, § 35.*) It is so stated in the affidavit. 3. That the claim is split up in three suits. It is on three notes. Plaintiff had a right to bring three suits. The only risk he runs is, that he may, under the statute, only be allowed costs in one, and the disbursements of the other two.

SUTHERLAND, J.—The general principle is, that courts in rendering judgments must have jurisdiction not only of the subject-matter, but also of the person; but I understand that a writ of prohibition issues only on the ground that the inferior court or tribunal is taking cognizance, or is about to proceed to take cognizance of matters not within its jurisdiction. (*Bac. Abr., tit. Prohibition, K.*)

In this case it appears that the three suits in the Marine Court against the relators were severally commenced by attachment. The attachments were processes to obtain the appearance of the relators as defendants in those suits. They claim that the attachments were irregularly issued; that the affidavits on which they were based were insufficient, and did not give the Marine Court jurisdiction; but this question of jurisdiction relates to the person only, and need not and can-

People on rel. Brownson a. The Marine Court of the City of New York.

not, I think, be properly determined on this application for a writ of prohibition. Besides, the relators, on the return of the attachments, appeared, and moved to discharge them, on the ground that the affidavits on which they were issued were insufficient; which motion was denied. If the Marine Court decided erroneously on this point, the remedy is by appeal, or perhaps by action, when any judgments which may be obtained shall be enforced, or attempted to be enforced.

The remaining question, then, is, whether the Marine Court has jurisdiction of the subject-matters of the three actions.

The three actions are on three several promissory notes for \$600, \$650, and \$600, respectively; the respondent Slocum, the plaintiff in those suits, claiming to recover only the amount of \$500 in each suit, on one of the notes.

The relators in their answer, in each suit, after pleading to the jurisdiction on several grounds, set up three several counter-claims arising on contract; one for \$80, one for \$1,200, and the other for \$1,000.

The answers are severally verified.

The question is, whether the Marine Court has now jurisdiction of the subject-matter of these actions, and can proceed in them to hear the proofs of the parties.

In my opinion it has such jurisdiction, and can proceed to hear the proofs of the parties.

By the Code, in an action arising on contract for the recovery of money only, the Marine Court had jurisdiction when the amount claimed did not exceed one hundred dollars; but it had no jurisdiction of a matter of account "where the sum total of the accounts of both parties proved to the satisfaction of the justice shall exceed four hundred dollars." (*Code*, §§ 53, 54, subd. 4, 65.)

By the act of April 17, 1852, § 9, the jurisdiction of the Marine Court was extended in these words: "In all cases in which the jurisdiction of said Marine Court is now limited, so that there can be no recovery therein for a larger amount than \$100, the jurisdiction is hereby extended, so that in such actions the recovery of either party may hereafter be to the amount of \$250, with costs," &c.

By the act of July 21, 1853, § 2, the jurisdiction of the Marine Court is further extended, in these words: "In cases

People on rel. Brownson a. The Marine Court of the City of New York.

where the jurisdiction of said court is now limited, so that there can be no recovery therein for a larger amount than two hundred and fifty dollars, the jurisdiction is hereby extended, so that in such cases the recovery of either party may hereafter be to the amount of \$500, notwithstanding that the accounts of both parties may exceed \$400."

It will be seen that the limitation of the jurisdiction by the provisions of the acts of 1852 and 1853 quoted, is as to the amount of the recovery of either party.

By the act of 1853, the Marine Court has jurisdiction, "notwithstanding that the accounts of both parties may exceed \$400." The excess is not qualified or limited.

It would appear that the limitation of jurisdiction as to matters of account by the Code, § 54, subd. 4, which limitation depended on the "sum total of the accounts of both parties proved to the satisfaction of the justice," if it applied to the Marine Court, has been wholly taken away by the act of 1853; and yet by the express words of the act the Marine Court cannot render a judgment for either party for over \$500.

Where there are claims and counter-claims arising on contract, I think the question of jurisdiction must be determined by the admissions or proofs, and not by the mere statement of the claims on the pleadings, although verified.

If the respondent Slocum proves his claim, and the relators prove their whole counter-claim, or to an amount exceeding one thousand dollars in any one of the three suits, the court can give them judgment for \$500 only; and as they cannot be compelled to split up any one of their claims arising on one contract, or to release any part of it, in my opinion the result is, that the Marine Court should on such proof, and upon the relators declining to take judgment for \$500 only, dismiss the suit. But in case the Marine Court should refuse to do so, either upon the ground that the proof was not satisfactory, or upon any other ground, I do not mean now to express an opinion on the question, whether the relators' remedy would be by writ of prohibition or by appeal, or by an equitable action to stay Slocum's judgments in the Marine Court, until they could recover judgment for their counter-claims in a court of sufficient jurisdiction.

People on rel. Brownson a. The Marine Court of the City of New York.

In any view of the question of jurisdiction, the relators are premature in their application for a writ of prohibition.

In this court the respondent Slocum could have included his claims on the three several notes in one action, and if he had brought three actions,—one on each note,—he would have done so subject to the power of the court to consolidate them into one action.

There are some old common-law cases which would go to show that the respondent Slocum had no right to reduce his claim on the relators' three notes severally, for the purpose of giving the Marine Court jurisdiction; that his doing so should be considered a fraud on this court, and that upon that ground a prohibition should be granted.

There are also old common-law cases which go to show that the bringing of the three several actions, on the three several notes, in the Marine Court at the same time, should be considered as intended to defraud this court of its jurisdiction. (*Bac. Abr.*, tit. *Prohibition*, *K*, and cases there cited.) But I doubt the applicability of this principle of fraud to the question of jurisdiction in this case at this day, or to the system of courts here, where we have several courts of superior concurrent jurisdiction. Certainly this court has no cause to complain of being defrauded of its jurisdiction, and I do not see how the relators can complain of being acquitted of the payment of \$100 of each note.

The cases cited by the counsel for the relators, to show that no facts being set forth in the returns of the Marine Court in answer to the alternative writs, an absolute prohibition must issue of course, assume that the facts upon which the alternative writ issues, unanswered, are sufficient to authorize the absolute writ.

Upon the whole, I think the application for the absolute writs should be denied, but without costs.

II. *March*, 1862.—From this decision the relator appealed to the general term.

BY THE COURT.—INGRAHAM, P. J.—We see no good reason for granting the writ of prohibition asked for on these motions.

People on rel. Brownson a. The Marine Court of the City of New York.

The writ does not issue to correct irregularities or errors in administering justice by inferior courts, but to prevent courts from going beyond their jurisdiction in the exercise of judicial power in matters over which they have no cognizance (2 *Hill*, 367; 7 *Wend.*, 518), but it ought not to issue where the party has a complete remedy in some other and more ordinary form. (2 *Hill*, 367.)

In the present case, the first ground upon which the writ is asked is, that the affidavits on which the proceedings complained of were founded, did not show certain matters which the relators think necessary to have justified the issuing of the attachments. This is so clearly a matter of practice in the court, to be remedied first by a motion to the court, secondly by an appeal to the general term, and next to the Common Pleas, that it seems only necessary to mention it, to show that the error is not to be corrected by a writ of prohibition.

Another ground on which the relator asks for the writ is, that the debt for which the plaintiff was entitled to sue was larger than the jurisdiction of the Marine Court permitted to be recovered in that court.

To obviate this difficulty, the plaintiff remitted all over \$500, and only sought to recover the latter sum. We think the defendant, who is relator here, has no cause to complain because the plaintiff sees fit to reduce the amount of his indebtedness by relinquishing to the debtor a part of his debt. It does not affect the jurisdictional question. The person and the subject-matter were both within the jurisdiction of the court, and there is nothing to show that the court attempted to exceed its powers in rendering judgment for a greater amount than the statute allowed. Nor do we consider it any act in fraud of the jurisdiction of the higher courts, calling for this particular remedy.

At the present day there is no necessity for such proceedings to preserve the jurisdiction of the courts—certainly none for applying such a remedy simply because the creditor gives to his debtor one-fifth of his indebtedness. The objection as to counter-claims is also expressly provided for in the act relating to the Marine Court.

None of these grounds show any attempt on the part of the court to exceed its jurisdiction, or to exercise any authority

Hubbard *a.* The New York and Harlem Railroad Company.

not conferred upon it by law. There is therefore no reason for issuing this writ, and the order at special term denying this application should be affirmed.

LEONARD, J., concurred.

Order affirmed, with costs.

HUBBARD *a.* THE NEW YORK AND HARLEM RAILROAD COMPANY.

Supreme Court, First District; General Term, April, 1862.

ASSIGNMENT BY DELIVERY.—BLANKS IN WRITTEN INSTRUMENT.—
COMPLAINT ON RAILROAD BOND.—AUTHORIZED BANKING.

Where, in an instrument for the payment of money, the name of the payee is left blank, with the intention that such instrument may be transferred by delivery, since any lawful holder may fill the blank with his own name as payee, he may plead it in an action thereon as having been delivered to some persons unknown, for a consideration from them received, and as having thereafter come lawfully into plaintiff's possession, and that he is owner thereof.

Form of a complaint, in such case, held sufficient on demurrer.

The act to restrain unauthorized banking is inapplicable to obligations not payable on demand.

Appeal from a judgment upon a demurrer as frivolous.

This action was brought by John M. Hubbard, against the New York and Harlem Railroad Company, upon two bonds made by the defendant for \$1,000 each. The first cause of action set forth in the complaint was as follows;

"For a first cause of action, that on the first day of September, 1849, at the city of New York, the defendants, a corporation incorporated by the laws of this State, in pursuance of a resolution of their board of directors, passed on the 8th day of August, 1849, made and delivered their note or obligation, partly printed and partly in writing, which they signed by their

Hubbard *a.* The New York and Harlem Railroad Company.

president and treasurer, and affixed the seal of the company thereto, and of which note or obligation the following is a copy."

The body of the instrument was as follows:

"This certifies, that the New York and Harlem Railroad Company has received the sum of one thousand dollars from
and in consideration thereof, doth

hereby promise and agree to pay to

or assigns, the sum of one thousand dollars, on the first day of August, one thousand eight hundred and fifty-nine (1859), and also interest for the same at the rate of seven per centum per annum, on the first day of every February and August, ensuing the date hereof, until said principal sum shall be paid, upon presentation of the annexed interest-warrants, as they severally become payable, at the office of the company, in the city of New York."

"That said note or obligation was so made, and upon receipt of the sum therein mentioned, or other valuable consideration therefor, from some person unknown to the plaintiff, the defendant delivered the same to such person for the purpose and with the intent that the same should be assignable and transferable by delivery from hand to hand without other writing; that before the maturity of said note or obligation, it came lawfully into the possession of the plaintiff for value received, so that he became the owner and holder thereof, and entitled to the money therein promised to be paid; that there is now due to this plaintiff thereon from the defendant, the sum of one thousand dollars, with interest thereon from the 1st day of August, 1859." The second cause of action was upon another similar bond, and was set forth in the same form.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Mr. Justice Mullin ordered judgment for the plaintiff on the demurrer as frivolous. From that judgment the defendants appealed.

Charles W. Sandford, for the appellants.

Nathaniel A. Cowdrey, for the respondent.—The complaint shows a good cause of action—a copy of the obligation on which the suit is brought is given; this under the laws of this State is

Hubbard v. The New York and Harlem Railroad Company.

sufficient. The action is brought in the name of the party in interest. The question whether the bond is negotiable or not, is not material; it is properly transferred or assigned to the plaintiff. But it is now too late to deny the negotiability of railroad bonds. The courts of nearly every State have held them to be negotiable. (8 *Paige*, 526; *Illinois v. Delafield*, 2 *Hill*, 159, 177; 13 *N. Y.*, 599, 625; 19 *Ib.*, 20, 23, 24; 1 *Stockt.*, 700; 27 *Penn.*, 418; *Society for Savings v. New London*, 28 *Conn.*; *Aspinwall v. Knox County*, 21 *How. Pr.*, 539; *Craig v. Vicksburg*, 31 *Miss.*, 216; *Redfield on Railways*, § 239.) The fact that the name of the payee is omitted is immaterial. The promise to pay is for the benefit of the holder. One for whose benefit a promise is made, may sustain an action to enforce the promise. Bank-bills and promissory notes are often made payable to a fictitious payee—this does not prevent a holder from recovering damages for a breach of the promise. It is competent for the plaintiff to insert his own name in the obligation as payee at any time, and the judgment will stand good.

BY THE COURT.*—LEONARD, J.—The action is upon two of the Dover Extension bonds of the railroad company, dated in 1849, payable August 1, 1859, for \$1,000 each. These bonds acknowledge the receipt of \$1,000 from ———, and in consideration thereof the railroad company promise and agree to pay to ———, or assigns, the sum of, &c. The name of the person from whom the money was received and of the payee are left in blank. The complaint avers that the corporation received the money from some person unknown to the plaintiff, and delivered the bond to such person for the purpose and with the intent that the same should be assignable and transferable by delivery from hand to hand without other writing; that before its maturity it came lawfully into the possession of the plaintiff for value, and that he is the owner and holder.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

On motion at special term, judgment was rendered for the plaintiff, on account of the frivolousness of the demurrer, and the defendants have appealed from the judgment.

* Present, INGRAHAM, P. J., LEONARD and CLERKE, JJ.

Hubbard *a.* The New York and Harlem Railroad Company.

The defendants insist that the alleged intent is inconsistent with the instrument itself, and cannot be the subject of proof.

There are numerous authorities holding that the bond of a corporation, payable to an individual or bearer, is a negotiable instrument. The word *bearer* in such a case includes the holder, whoever he may be. I am not aware, however, of any decision that an obligation, payable as these are to an individual or his assigns, has been holden to be negotiable by mere delivery.

The averments of the complaint, however, take the case out of any difficulty on that subject. These bonds were left in blank, as to the payee, intentionally, so that they might be transferred by delivery.

The intent was admitted by the demurrer.

The plaintiff or any other lawful holder, by delivery or transfer, may now fill his own name into the blank as the payee. (Mitchel *a.* Culver, 7 *Cow.*, 336; Boyd *a.* Brotherson, 10 *Wend.*, 93; *Exp.* Kerwin, 8 *Cow.*, 118; Clute *a.* Small, 17 *Wend.*, 238, 243.)

The intent alleged appears to be in harmony with the instrument. It in no manner contradicts its tenor or effect.

The defendants also insist that if the averment of intent be true, then the instrument is in violation of the act to restrain unauthorized banking, and therefore void.

This is an ungracious objection after the acknowledgment of the receipt of the money contained in the bonds.

It is, however, without any foundation. They are payable ten years after date, and cannot be circulated as money. Obligations which circulate as money are payable on demand.

The objections to the complaint are untenable. I have given more attention to the decision of this appeal than the questions involved warrant, because the counsel for the defence was absent when the cause was reached on the calendar, and it was submitted on his points without oral argument.

Judgment is affirmed, with costs.*

* This decision was followed in another similar case, against the same defendants, which came up at the same term.

BETTS v. BACHE.

*New York Superior Court; Special Term, April, 1862.
Again, at General Term, June, 1862.*

PLEADING.—FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.
—COMPLAINT IN ACTION TO RECOVER MONEY LOST BY BETTING
OR GAMING.

It seems, that a charge of receiving the plaintiff's money contrary to the statute of betting and gaming, with the statement of other circumstances necessary to make it definite and certain, is a sufficient statement of facts constituting a cause of action.

The form of declaration allowed by 2 Rev. Stat., 347, § 1, in actions of debt to recover any money, goods, or things, received by any person contrary to the provisions of any statute, is not objectionable under the Code for not containing facts sufficient to constitute a cause of action.

A complaint which avers "that the defendant received the sum of \$1813.47 belonging to, or on account of, the plaintiff, and which is now due him," states facts sufficient to constitute a cause of action.

I. *April, 1862.*—Demurrer to the complaint.

This action was brought by Frederick F. Betts, against John H. Bache, to recover \$1813.47 alleged to have been lost by betting and gaming. The complaint alleged, that on or about the 1st day of October, 1861, the defendant received the sum of \$1813.47, belonging to, or on account of the plaintiff, and which is now due him, contrary to the provisions of the statute against betting and gaming, and claimed judgment therefor. To this the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action.

George C. Barrett, in support of the demurrer.

Daniel M. Porter, opposed.

ROBERTSON, J.—This is an action to recover money lost by betting and gaming. The complaint alleges that about the 1st of October, 1861, the defendant received a certain sum of money belonging to or on account of the plaintiff, and which is

*affirmed
14 Oct. 28*

now due him, "contrary to the provisions of the statute against betting and gaming." To this a demurrer is put in, assigning as grounds therefor that it does not state facts sufficient to constitute a cause of action.

The Revised Statutes provide (2 *Rev. Stat.*, 352, § 2), that "if an action of assumpsit be brought for money received contrary to the provisions of any statute, it shall be sufficient . . . to allege . . . that the same was received contrary to the provisions of such statute referring to the same, as prescribed in the last section." In that section (§ 1), it is provided that "if an action of debt" be brought for money, goods, or other thing so received, it shall be sufficient "to allege that the defendant, &c., was indebted" in such sum or the value of such goods, "whereby an action has accrued to the plaintiff according to the provisions of such statute, naming the subject thereof in the following form, to wit, "according to the provisions of the statute against betting and gaming," or in some other general terms referring to such statute. By § 140 of the Code, all forms of pleading theretofore existing were abolished, and thereafter forms of pleading, and the rules to determine the sufficiency of pleadings, were required to be such as were prescribed by that act. This is contained in the second part of the Code. By § 471 of the Code, it was declared that such part should "not affect existing statutory provisions relating to actions not inconsistent with that act, and in substance applicable to the actions thereby provided." The 142d section of the Code provides that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition."

In the case of *Morehouse v. Crilley* (8 *How. Pr.*, 431), it was held that the form of complaint prescribed by the Revised Statutes, in case of an action for a penalty, was bad, because it was abolished by § 140 of the Code. In the case of the *Bank of Genesee v. Patchin Bank* (13 *N. Y.*, 309), the Court of Appeals held that the provision of the Revised Statutes dispensing with proof of the existence of a corporation in a trial in an action brought by one (2 *Rev. Stat.*, 458, § 3), was not repealed by the Code. In that case, *DENIO, J.*, after referring to §§ 140 and 471 of the Code, and the object of the provision in question, says: "There are the same reasons of

convenience for it now which existed under the former system, and it does not conflict with any particular provision of the Code, and therefore remains in force." In the case of *People v. Bennett* (5 *Abbotts' Pr.*, 384), the Supreme Court held that in an action for a penalty, § 140 of the Code had not repealed the provisions of the Revised Statutes respecting such actions, which are contained in chapter eight of the third part of the Revised Statutes, because such chapter is expressly exempted from the effect of the Code by § 471; and that the decision in *Morehouse v. Crilley* (*supra*) was made in consequence of overlooking such express exemption. In several cases it has been held that the Code has not repealed the provisions respecting pleadings in actions against corporations. (*Bank of Waterville v. Beltser*, 13 *How. Pr.*, 270; *Johnson v. Kemp*, 11 *Ib.*, 186; *Union Mut. Ins. Co. v. Osgood*, 1 *Duer*, 707.)

The question in this case, therefore, is, whether the form of declaring prescribed in the Revised Statutes is not a plain and concise statement of the facts constituting the cause of action in this case; and this stands entirely aloof from the question whether it is sufficiently definite and certain. Whether times, places, amounts, persons, contingencies, and events are sufficiently described to notify the defendant of the identity of the transaction aimed at, is to be determined by a different mode of proceeding: that raises the question of degree in regard to the plainness of the statement, as a motion to strike out redundant matter does as to its conciseness; but the question under consideration is, whether a charge of a receipt of certain of the plaintiff's money contrary to the provisions of a particular statute specified therein is not a statement of facts constituting a cause of action, and the statute allowing such a form is not in substance applicable to a provision requiring such a statement. The authors of the Code, undoubtedly, meant only to require parties in their pleadings to show generally that they had a good cause of action, unless the adverse party complained of not being sufficiently notified of the particular transaction; the remedy for the first defect being a demurrer, and the second a motion.

What constitutes the "facts" required by the Code to be stated in a pleading is still unsettled. It has been held, both that facts may be stated according to their legal effect (*Boyce*

Betts *a.* Bache.

a. Brown, 7 *Barb.*, 80; *Coggill a. Am. Ex. Bank*, 1 *N. Y.*, 113), or as they exist. (*Ives a. Humphreys*, 1 *E. D. Smith*, 196.) It was held that a party should have pleaded payment, where he pleaded facts from which the law presumed it (*Pattison a. Taylor*, 1 *Code R., N. S.*, 174); and a promise, instead of the facts from which the law implied it. (*Hall a. Southmayd*, 15 *Barb.*, 32, 35.) In *Cady a. Allen* (22 *Barb.*, 388), it was held that there were certain allegations of law and fact mixed, which left it to the pleader's option to state the facts, or the conclusion as to the mode by which a judgment becomes a lien on real estate, or the ownership or title to property. It has been held not necessary to state a contract within the Statute of Frauds to be in writing. (*Livingston a. Smith*, 14 *How. Pr.*, 490; *Hilliard a. Austin*, 17 *Barb.*, 141.) A statement that a party was indebted on a balance of account stated and due, which he promised to pay, was held sufficient. (*Graham a. Camman*, 13 *How. Pr.*, 360.) A party may still sue for use and occupation, notwithstanding the existence of a sealed lease. (*Ten Eyck a. Houghtaling*, 12 *How. Pr.*, 523.)

It would seem, therefore, that a charge of receiving the plaintiff's money contrary to the statute of betting and gaming, with the statement of any other circumstances necessary to make it definite and certain, such as time, amount, and person, and the like, would be a sufficient statement of facts constituting the cause of action, without stating the particular contingency on which the money was staked, or other details, at least on an objection which only raises the question that nothing was stated from which the court could perceive there was a cause of action. I think, too, that the provision of the Revised Statutes allowing such a general form of declaring was, in substance, applicable to the actions permitted by the Code; the circumstances of secrecy attendant upon illegality, and sometimes confusion accompanying the loss of money on real or pretended wagers, might often render it impossible for a party to describe minutely the particular mode or contingency on which a wager was lost; the law therefore, in such cases, allowed such a general form of describing the occasion and mode of the fraud; and the same reason prevails with double force under a system which permits more accurate information to be called for when necessary.

I cannot, therefore, doubt that the form prescribed by the Revised Statutes is such a plain statement of the facts constituting a cause of action, as not to be, under the Code, objectionable for not containing facts sufficient to constitute such cause; and that, if indefiniteness prevails, it is to be amended by motion, not on demurrer.

It is true the provisions of the Revised Statutes preserve the distinction of forms of actions in debt and assumpsit, but this, in fact, affects the substance; because debt is brought for penalties by the party injured, or for money lost by an informer, while assumpsit was only maintainable by the party injured to recover back his own money; and this distinction is observed in the two prescribed forms: that in case of debt, requiring the plaintiff to state an indebtedness by which an action has accrued; and that in case of assumpsit, permitting the aggrieved party to declare for money of his received.

The demurrer must be overruled, with costs, and judgment for the plaintiff, with liberty to the defendant to amend on payment of such costs.

II. *June, 1862.*—Appeal from the order overruling the demurrer.

From the order of the special term, the defendant took an appeal to the general term.

George C. Barrett, for the appellant.—I. This is not an action for a statutory penalty excepted from the operation of § 140 of the Code by § 471 (*People v. Bennett*, 5 *Abbotts' Pr.*, 384): it is merely a right of action given to one individual against another, by statute. (1 *Rev. Stat.*, 662, §§ 8, 9.) Section 471 of the Code does not apply to such action.

II. It is not excepted by the additional provision of § 471, saving statutory provisions not inconsistent with the Code; for rules respecting "pleadings and set-offs." 2 *Rev. Stat.*, 347, § 1, are plainly inconsistent with the Code. Section 140 abolished "all forms of pleading heretofore existing."

III. *Bank of Genesee v. Patchin Bank* (13 *N. Y.*, 309) is not adverse. That was one of the cases excepted by the Code, § 471. Even there the court deemed it necessary to show that such exception was not inconsistent with the provisions of the Code.

1. The pleading in that case was good under the Code. 2. Here the fundamental requirement of a complaint under the Code, viz., a concise statement of the facts constituting a cause of action, is wanting.

IV. The Code contains within itself provisions for all cases in which its rules are to be relaxed (*Code* §§ 161-164.)

V. The plaintiff has not even followed with precision the form which he attempted to adopt.

VI. Judged under the Code, the complaint is bad. It must be remembered that before the enactment of 2 Rev. Stat., § 347, § 1, the declaration, in actions for penalties, was bad unless the special matter was set forth. (*People a. Brooks*, 4 *Den.*, 469; *Cole a. Smith*, 4 *Johns.*, 193; *Bigelow a. Johnson*, 13 *Ib.*, 428; *Collins a. Ragrew*, 15 *Ib.*, 5.) We submit that the court below was in error in confusing "facts" with "legal conclusions."

VII. The doctrine of legal conclusions, if sustained, will reduce the system of pleading to great simplicity. The plaintiff will state that he has been wronged "contrary to law," and is entitled to judgment "according to law"

VIII. The two systems, the Code and the Statute, cannot be mingled to sustain the complaint. It must be judged by one or the other; it is bad under each.

Daniel M. Porter, for the respondent.—I. The complaint is sufficient in form and substance. It shows that the defendant received money belonging to or on account of the plaintiff, which is now due the plaintiff, showing a present right to the money so received. The old money counts are good under the Code. (*Adams a. Holley*, 12 *How. Pr.*, 326; *Allen a. Patterson*, 7 *N. Y.*, 476; *Sloman a. Schmidt*, 8 *Abbotts' Pr.*, 5.) *O'Maley a. Reese* (6 *Barb.*, 658) decides that the general count for money had and received is good in a case like the present. This complaint differs from the one in *Lienan a. Lincoln* (2 *Duer*, 670), as it avers the money to be "due" the plaintiff, *i. e.*, "payable." (See *Allen a. Patterson*, 7 *N. Y.*, 476.) If the defendant wished the complaint to point out the particulars how the money was received, &c., he could move to make definite, or demand a bill of particulars.

II. The form adopted is authorized by 2 Rev. Stat., § 352, § 2. This statute is not inconsistent with the Code: it defines what

Birkbeck *a.* Stafford.

shall be the legal facts necessary to be pleaded, leaving the form of action regulated by the Code; that is, the facts stated in the complaint must be taken as stating sufficiently a cause of action. (*People v. Bennett*, 5 *Abbotts' Pr.*, 384; *Bank of Genesee v. Patchin Bank*, 13 *N. Y.*, 309.)

BY THE COURT.*—MONCRIEF, J.—The Code requires a “plain and concise statement of the facts constituting a cause of action” to be contained in a complaint. (*Code*, 120, § 142.) In my opinion this complaint, under the decisions in *Cudlipp v. Whipple* (4 *Duer*, 610), *Allen v. Patterson* (7 *N. Y.*, 476), and *Keltas v. Myers* (19 *Id.*, 231), is a compliance with and satisfies the requirement of the Code upon general demurrer. If it be true “that the defendant received the sum of \$1813.47, belonging to or on account of the plaintiff, and which is now due him,” and the defendant by his demurrer admits it to be true, the plaintiff is entitled to judgment against the defendant for that amount. The further, and in this regard superfluous, averment that it was “contrary to the provisions of the statute against betting and gaming” will not vitiate the complaint. The order overruling the demurrer, &c., is correct, and must be affirmed with costs. As it was suggested that the defendant has a defence, upon presenting a proper case to be permitted to put in an answer at the time of settling this order, leave may then be given to withdraw the demurrer and answer.

Order affirmed.

BIRKBECK *a.* STAFFORD.

Supreme Court, Second District; General Term, May, 1862.

LIABILITY OF ATTORNEY FOR SHERIFF'S FEES.—OFFICIAL CERTIFICATES.—MANAGING CLERK.—ASSIGNABILITY OF CLAIM FOR SHERIFF'S FEES.

The attorney is liable to the sheriff, for fees on process delivered to him for execution.

In an action by a sheriff to recover his fees for the execution of a warrant of at-

* Present, BOSWORTH, Ch. J., MONCRIEF, ROBERTSON, BARBOUR, and MONELL, JJ.

Birkbeck *v.* Stafford.

attachment issued as a provisional remedy, the certificate of the justice who issued the warrant is conclusive evidence as to the amount of the sheriff's compensation.

The fact that such certificate is made after the action to recover the sheriff's compensation is brought, does not alter its effect as evidence.

An attorney is bound by the acts and declarations of his managing clerk in matters within the scope of the latter's agency.

The claim of a sheriff for services rendered and expenses incurred in the execution of process, is assignable.

Appeal from a judgment.

This was an action by Abraham W. Birkbeck, assignee of George Remsen, sheriff of Kings county, against William R. Stafford and John Davidson, to recover \$263, sheriff's fees and compensation. On the 22d June, 1860, one Spencer H. Stafford, as one of a firm of attorneys-at-law, of which the defendants were members, caused to be delivered to Remsen, the sheriff, a warrant of attachment issued by Mr. Justice Leonard, as a provisional remedy in an action in the Supreme Court, brought by one Babcock, and in which Stafford's firm were Babcock's attorneys. The plaintiff, as deputy-sheriff, had charge of the attachment, and under it seized the bark *Ardenne*s, put a man in charge of her, and from time to time visited the vessel himself. There were no specific directions given by either of Babcock's attorneys at the time of issuing the attachment, as to the proceedings to be taken by the sheriff, nor did they direct the placing of a man in charge of the vessel. On the 30th of June, 1860, the clerk of Babcock's attorneys wrote to the plaintiff, at the request of Babcock, to put another man in charge, if actually necessary, but nothing was ever done under this notice. The bark was subsequently claimed as the property of third persons, and in accordance with a finding by sheriff's jury, was surrendered to the claimants, the plaintiff declining to indemnify against the claim. After the commencement of the present action, and on the 3d of May, 1861, the attachment was returned to and filed with the clerk of the city and county of New York. The sheriff assigned his claim March 6th, 1861, and this action was commenced March 19th, 1861. The answer set up, with other matter of defence, the non-joinder of S. H. Stafford as a defendant; but the court had directed that this defence be waived, on excusing a previous default of the

defendants. The cause was referred to D. P. Barnard, as sole referee, in June, 1861. Pending the trial, and on July 25th, 1861, the plaintiff procured *ex parte* from Mr. Justice Leonard a certificate as to the compensation of the sheriff upon the attachment, allowing \$258 as reasonable compensation, in addition to the fees established by law. On the 20th September, 1861, on affidavits, and after hearing counsel for both parties, this allowance was confirmed on motion to set it aside, with the exception of \$3 directed to be deducted therefrom. On the first day of July, 1860, the defendants' firm was dissolved, and the charge of the attachment-suit taken by W. R. and S. H. Stafford, of which the sheriff had notice. The referee held that the defendants were liable, as attorneys, for the claim in question; that the entire claim passed to the plaintiff, under the assignment, by the sheriff, and that the certificate of Justice Leonard precluded any defence as to the amount; and after denying defendants' motion for a nonsuit, ordered judgment in favor of the plaintiff. From the judgment thereupon entered, the defendants appealed.

William R. Stafford, for the appellants.—I. The defendants having acted in the known character of agents, cannot be made liable for the proceedings or expenses of the sheriff on the attachment. 1. The cases in this State which hold an attorney liable for sheriff's fees are entirely anomalous, and violate all the established rules as to the liability of agents. (4 *Cow.*, 260; 11 *N. Y.*, 408; 2 *How. Pr.*, 105.) 2. They should not be followed except in cases precisely similar, and can have no effect under the Code. 3. They assume that the law raises two distinct promises: one, by the known principal; and another by his agent. 4. They are contrary to every adjudged case in this country and England. (*Judson a. Gray*, 11 *N. Y.*, 408.) 5. If followed, they will result in holding an attorney liable not only for the fees, but for the acts of all he is obliged to employ.

II. None of the assumed grounds for liability in the reported cases exist in the present. 1. The plaintiff's assignor was not bound to hold the attached property, but could have refused unless indemnified, or paid, or secured his fees. (2 *Rev. Stat.*, 839, § 6; *Judson a. Gray*, 11 *N. Y.*, 408; *Saunders a. Harris*, 4 *Humph.*, 72.) 2. The statute (2 *Rev. Stat.*, 4 ed., 189, § 12)

provides that the costs and charges shall be paid, not by the attorney, but by the attaching creditor. The next section permits the bond on retention to be given by the creditor, his agent, or attorney. By implication, the liability is fixed upon the principal, and not upon the attorney.

III. In no event could the attorney be made liable for the extra compensation allowed by Justice Leonard. 1. The distinction between fees and compensation is clearly made. (2 *Rev. Stat.*, 835, § 21.) 2. The parties liable for, and to whom the sheriff must look for pay, being designated by the statute under which he acts, the sheriff cannot, without express authority, charge his additional compensation to others, or hold them liable. (*Camp v. Carr*, 6 *Wend.*, 535; *Hatch v. Mann*, 15 *Ib.*, 44.)

IV. There was no proof of such a discharge of his duties, as attaching officer, as would authorize the recovery of his fees by the sheriff. 1. It was the sheriff's duty to make an inventory within ten days. This was never done. (2 *Rev. Stat.*, 4 ed., 188, § 8.) 2. It was also his duty, at the lapse of thirty days, to sell the vessel. (2 *Rev. Stat.*, 191, §§ 26 et seq.) 3. The sheriff, at the time of the commencement of this action, had not even returned the attachment.

V. The assignment by the sheriff to the plaintiff was wholly inoperative. 1. Nothing passed to the assignee but what the sheriff (the assignor) was legally entitled to at its date. (*Murrill v. Lewis*, 4 *Hill*, 635.) 2. The interest of the sheriff was clearly uncertain, until ascertained and determined by the officer issuing the warrant, and until then incapable of assignment. 3. Nor could the plaintiff, himself the deputy executing the writ, purchase the claim from the sheriff. (*Hawley v. Cramer*, 4 *Cow.*, 717; *Currie v. Hart*, 2 *Sandf. Ch.*, 353; *Mills v. Young*, 23 *Wend.*, 314.)

VI. The *ex-parte* certificate of Justice Leonard was improperly admitted in evidence. The question at issue was, What, if any thing, was due the plaintiff on the 19th of March, 1861?

VII. The declarations of defendants' clerk were not made in their presence, or authorized by them. They were not shown to have been within the scope of his authority.

Nathaniel F. Waring, for the respondent.—I. The various findings of fact are fully sustained by the testimony.

II. The defendants having had the costs, &c., retaxed on their motion, are concluded from questioning the amount. (*Supreme Ct. Rules*.)

III. The attorney is liable to the sheriff for his fees and expenses. (Opinion of Chancellor in *Trustees, &c., v. Cowen*, 5 *Paige*, 510; *Adams v. Hopkins*, 5 *Johns*, 253.)

IV. The return on the attachment is *prima-facie* evidence that the service was incurred, and the amount of fees. (1 *Cow. & Hill's Notes*, 1093.)

V. The officer who issued the attachment having certified to the amount of the sheriff's compensation over and above his fees, it is final and conclusive. (2 *Rev. Stat.*, 646.)

BY THE COURT.*—LOTT, J.—The material facts found by the referee are sustained by the evidence in this case, and warrant the conclusion of law to which he has arrived. It has long been settled that an attorney is liable to a sheriff for his fees and compensation on process delivered to him for execution. This principle, although anomalous, was established in *Adams v. Hopkins* (5 *Johns.*, 253). It was extended by the chancellor to examiners in chancery, in the *Trustees of Watertown v. Cowen* (5 *Paige*, 510), and was there said by him to apply to the different offices of courts of record, and was recognized as a settled rule of law in this State, in *Judson v. Gray* (11 *N. Y.*, 408). The sheriff is by statute declared to be entitled for serving an attachment to the sum of "fifty cents, with such additional compensation for his trouble and expenses in taking possession of and preserving the property attached as the officer issuing the warrant shall certify to be reasonable." (2 *Rev. Stat.*, 646, § 38; *Code*, § 243.) His right to payment of the amount so certified is as fixed as the specific sum of fifty cents named. Whether notice of the application to such officer is necessary to be given to the party liable or responsible therefor, it is not necessary to determine here. It appears by the decision of the referee that an account of the sheriff's fees was delivered to the defendant before the commencement of this action, that no taxation or certificate thereof was demanded by them, and that the officer, after the certificate was given by

* Present, BROWN, SCRUGHAM, and LOTT, JJ.

Birkbeck *a.* Stafford.

him, did, on the 28th day of September, 1861, after hearing affidavits and hearing counsel for both parties, order that the same be affirmed, after the deduction of three dollars from the compensation previously allowed by him for such trouble and expenses. Although this order is not set forth in the case, it is referred to by the counsel of respondent in his points, and no question has been made as to the fact by the appellants. I therefore assume it was made. It is true that the certificate was not made till after the issue was joined in this action, but that is immaterial. The services had been rendered, and the right of action therefore had accrued before the suit was commenced. The certificate was merely an adjustment or a liquidation of the amount to which the sheriff was entitled, but it did not create or confer the right itself. That was complete as soon as the service had been performed, and there can be no doubt that the defendants in this action, under the rule of liabilities of attorneys, to which I have referred, are chargeable with and responsible for those services. It fully appears that John J. Post, who delivered the attachment at the sheriff's office, was the managing clerk of the firm of Staffords & Davidson, by whom it was issued, and his acts and declarations admitted in evidence were such as fell within the scope of his agency, and the firm are affected thereby. It is no objection to the plaintiff's right of recovery that Spencer H. Stafford, then one of that firm, is not made a party defendant. It appears in the case that the defendants, against whom a judgment by default had been entered, were permitted to come in and answer, on the condition that they should waive that objection. It can consequently not be relied on or made available now. It does not appear on the face of the complaint, and cannot be considered as taken by the answer, and must be deemed to be waived. (*Code*, § 148.)

The sheriff's claim was duly assigned to the plaintiff, and I see no reason, on the ground of public policy or otherwise, why the assignment is not valid, or available to the plaintiff. It was not a transfer of fees or compensation to be earned, but of an existing claim for services rendered, and expenses incurred previous to that time.

These views dispose of the principal questions raised by the exceptions taken on the trial, and urged on the argument.

 Stuart a. Salhinger.

The rest have been examined and fully considered, and none of them, in our opinion, are well taken.

The judgment must therefore be affirmed, with costs.

STUART a. SALHINGER.

New York Common Pleas; General Term, May, 1862.

INSOLVENT'S DISCHARGE.—ISSUES TO TRY VALIDITY.

The court will not try the validity of an insolvent's discharge on affidavits.*

* In *MANHATTAN OIL COMPANY a. THORN* (*Supreme Court, First District; At Chambers, June, 1862*), it was *Held*, that the court would not try the validity of an insolvent's discharge on affidavits; and that on motion the recitals of the discharge are conclusive.

Motion to set aside execution, and stay plaintiff's proceedings.

The action was brought by the Manhattan Oil Company against Alfred F. Thorn, to recover the price of certain merchandise sold. Judgment was entered in favor of the plaintiff in April, 1861, for \$1082.95. In September, 1861, defendant, who was a resident of Kings county, applied to Hon. Samuel Garrison, Kings county judge, for a discharge from his debts, under the Two-thirds Act (2 *Rev. Stat.*, 16). In his petition, which was partly written, partly printed, he described himself as a resident and an inhabitant of the city and county of New York: he had subsequently annexed to his petition the affidavit of a witness, to the effect that the debtor resided in the city of Brooklyn, county of Kings. The county judge, in November, 1861, granted the debtor a discharge, in due form, reciting among other things that the debtor was a resident of Kings county. In June, 1862, the plaintiffs in this action issued an execution on their judgment, under which a levy was made. Defendant now moved upon his discharge, and an affidavit setting forth his residence in Kings county, to set aside the execution, and for a perpetual stay of proceedings on the judgment.

J. Francis Walton, for the motion.—I. The copy of the discharge is in due form to be read in evidence. (1 *Rev. Stat.*, 377, § 65; *Peck a. Farrington*, 9 *Wend.*, 44; *People a. Denison*, 17 *Ib.*, 312.)

II. Thorn was discharged under 2 *Rev. Stat.*, 16, art. 3. This discharge is conclusive evidence of the facts therein recited, except those which are necessary to confer jurisdiction upon the officer granting the discharge; as to those it is *prima facie*. (2 *Rev. Stat.*, 38, § 19; *Stanton a. Ellis*, 12 *N. Y.*, 575; *Rusher a. Sherman*, 28 *Barb.*, 416.)

III. The court will not try the validity of the discharge upon affidavits, but will set aside the execution and levy, and compel the plaintiff to resort to his action to test the validity of the discharge. (*Russell & Erwin Manuf. Co. a.*

Stuart a. Salhinger.

Where it presumptively appears that an insolvent's discharge is void for any fraud, the court will deny a motion to set aside an execution issued against such insolvent, and direct issues triable before a jury to be framed to test the validity of the discharge.

Appeal from an order denying motion to set aside an execution.

Judgment had been recovered in the New York Common Pleas in favor of Sidney H. Stuart against Julius G. Salhinger for \$308.93. The defendant was discharged from his debts by Hon. Thomas W. Clerke, a justice of the Supreme Court, in the First Judicial District, on the petition of creditors having debts amounting to two-thirds of all the debts owed by him,

Armstrong, 10 *Abbotts' Pr.*, 258, note; Dresser a. Shufeldt, 7 *How. Pr.*, 85.) Bangs a. Strong (1 *Ib.*, 181), is not in conflict with our position. That case arose under the United States Bankrupt Act of 1841, which allows in terms "a discharge to be impeached for fraud or wilful concealment." (Reed a. Gordon, 1 *Cow.*, 50; Taylor a. Williams, 20 *Johns.*, 21; Noble a. Johnson, 9 *Ib.*, 259; Russell a. Packard, 9 *Wend.*, 431.)

IV. The Kings county judge had jurisdiction of the proceeding, and his discharge is conclusive. (Stanton a. Ellis, 12 *N. Y.*, 575; Rusher a. Sherman, 28 *Barb.*, 416.)

V. The ground upon which Judge Garrison claimed jurisdiction is immaterial. If he had jurisdiction, although for a different reason from that which he assigns in the order, that is sufficient. (More a. Thayer, 10 *Barb.*, 258; Graves a. McKeon, 2 *Den.*, 639.)

VI. The judge having jurisdiction, the regularity of his subsequent proceedings cannot be inquired into. (Bingham a. Disbrow, 14 *Abbotts' Pr.*, 251; Viburt a. Frost, 3 *Ib.*, 119.)

VII. As the defendant's discharge was granted after judgment, he may have relief on motion for stay. (Parkinson a. Scoville, 19 *Wend.*, 150; Baker a. Ulster C. P., 4 *Johns.*, 191.)

Hamilton Odell, opposed, cited *Cramer a. ———* (3 *Sandf.*, 700); *Stuart a. Salhinger* (case in text), and contended that the defendant was estopped by the language of his petition from denying his residence in New York.

BARNARD, J., held that the recitals in the discharge were conclusive on this motion, and set aside the execution.

In *WALL a. THORN* (*Supreme Court, First District; At Chambers, July, 1862*), it was likewise *Held*, that the court would not try the validity of an insolvent's discharge upon motion.

Motion by defendant Thorn to set aside execution, and for perpetual stay.

The motion was made in two actions brought by Charles Wall and others against Alfred F. Thorn and another. The facts, as shown by moving papers,

Stuart a. Salbinger.

under 2 Rev. Stat., 16. The judgment-creditor, after the granting of the discharge, issued an execution upon the judgment. The judgment-debtor now moved upon the discharge to set aside the execution, and for a perpetual stay. In opposition to this was read the affidavit of the creditor, setting forth that he never knew or had any knowledge that the debtor had made any application to be discharged from his debts until after the discharge was granted; that the plaintiff and defendant both resided and did business in the city of New York during the pendency of the application for defendant's discharge; that defendant knew where the office of the plaintiff was; that no notice of the application had ever been served upon the plaintiff personally, or received by mail; that if the plaintiff had

were as follows: On the 12th day of April, 1861, the plaintiffs obtained and docketed two judgments in this court against the defendants for \$2122.07. On the 26th day of September, 1861, the defendant Thorn applied with two-thirds of his creditors to Hon. Samuel Garrison, county judge of Kings county, for a discharge from his debts, under 2 Rev. Stat., 16, commonly called the "Two-thirds Act," and afterwards, and on the 14th day of November, 1861, Judge Garrison granted the discharge. That on the 23d day of June, 1862, the plaintiff caused an execution to be issued against the property of the defendants, in the county of New York, whereupon the defendant Thorn moved to set aside the execution, and for a perpetual stay.

J. M. Van Cott, for plaintiffs, argued that the discharge was void for jurisdictional defect, to wit, that the publication of the notice directed by Judge Garrison was made in the *Commercial*, one of the newspapers designated in the order to show cause, but forty-one days, instead of six weeks, and therefore the motion should be denied, or at least that a levy under the execution should not be disturbed until plaintiffs could bring an action to set aside the discharge. (19 *How. Pr.*, 238.)

J. H. & W. L. Van Derzee, for defendant.—I. The order to publish was dated September 28, 1861, the first publication October 4, 1861, and the hearing November 14, 1861. This was a full compliance with the order.

II. That the affidavit of publication annexed to and forming part of the papers is conclusive on this motion.

III. That the discharge is conclusive, and plaintiff must resort to his action. (1 *Cow.*, 50; 10 *Abbotts' Pr.*, 258; 20 *Johns.*, 21; 28 *Barb.*, 417; 7 *How. Pr.*, 85; 9 *Johns.*, 259; *Stanton a. Ellis*, 12 *N. Y.*, 575.)

IV. That the execution was irregular, and plaintiffs could acquire no rights under it, and were not entitled to hold their improper levy.

CLERKE, J., held that the question, whether a discharge under the Two-thirds Act was valid or invalid, was a solemn one, and that the question of jurisdiction under former decisions of this court could not be inquired into upon motion.

Motion granted.

Stuart *a.* Salhinger.

known of the application, he would have opposed it, and that he believed if the application had been opposed by any *bona-fide* creditor, it would not have been granted; that he believed the defendant had been guilty of fraud in each and all of cases mentioned in the statute as avoiding a discharge; that he believed defendant had compromised with most of his creditors, and that none except those who were so paid had petitioned for the discharge. There were no irregularities in the discharge suggested, and all the allegations of fraud were upon information and belief.

The court at special term made an order as follows: "That the said motion be and the same hereby is denied, on the plaintiff's serving issues to try the validity of the defendant's discharge within twenty days after the service of a copy of this order. Such issues are to be settled on notice to the defendant's attorney, and when so settled are to be tried by this court and a jury; and that the levy made by the sheriff of the city and county of New York upon the property of the defendant, be discharged upon the defendant giving a bond in the sum of \$350 to the plaintiff conditioned for the payment of the amount of the said judgment, interest, and sheriff's fees, to be approved by a judge of this court, or upon his depositing with the clerk of this court the sum of \$318, to abide the result of the issues so formed."

The defendant appealed.

John H. Trapp, for the appellant, cited *Reed a. Gordon* (1 *Cow.*, 50); *Taylor a. Williams* (20 *Johns.*, 21); *Noble a. Johnson* (9 *Ib.*, 259); *Russell a. Packard* (9 *Wend.*, 431), and *Rich a. Salhinger* (*MS. case*).*

* In *RICH a. SALHINGER* (*New York Common Pleas; At Chambers, December, 1860*), it was *Held*, that the validity of an insolvent's discharge could not be inquired into upon a motion or trial by affidavits; and that the only way to test the validity of the discharge is by action, in which the defendant may plead his discharge in bar.

Motion to set aside an execution.

This was an action by Alexander and Solomon Rich against Julius G. Salhinger. Judgment was entered in favor of plaintiffs for \$330.65, May 13, 1858. In September, 1859, the defendant was discharged from his debts by Hon. Thomas W. Clerke, justice of the Supreme Court, under the "Two-thirds Act." (2 *Rev. Stat.*, 16.) In June, 1860, the plaintiffs, disregarding the discharge, issued an

Stuart a. Salhinger.

John C. Van Loon, for the respondent, cited *Cramer a.* — (3 *Sandf.*, 700).

BY THE COURT.*—DALY, F. J.—Where an execution has been issued and a levy made, I see no objection to pursuing the course that was adopted in the case of *Cramer* (3 *Sandf.* 700); that is, where a motion is made to set the levy aside, or for a perpetual stay of proceedings, and the plaintiff in answer to the motion sets up that the discharge was improperly procured, and shows by affidavit on his part that there is ground for so believing, to retain the lien acquired by the levy, and order issues to be framed, that the question may be tried by a jury. All that had been decided previously was, that the court will not try the question of the validity of the discharge

execution upon their judgment. The defendant now moved to set aside this execution, upon an affidavit setting forth the foregoing facts, and on an exemplified copy of his discharge. In answer to the motion, plaintiffs read an affidavit denying the regularity of defendant's discharge, and averring that their execution was issued with the view to test its validity.

John H. Trapp, for the motion.

S. C. Conable, opposed, cited *Stanton a. Ellis* (16 *Barb.*, 319; S. C. affirmed, 12 *N. Y.*, 575); *Olcott a. Robinson* (20 *Barb.*, 148); *Layman a. Whiting* (*Ib.*, 559).

DALY, F. J.—This is a motion to set aside an execution issued after the defendant had been discharged under the Two-thirds Act. The motion is opposed upon the ground that no notice was received by the plaintiffs, or by either of them, of the defendant's application to be discharged. The fact that no notice was received by the plaintiff would not of itself show that the officer acted without jurisdiction; but independent of that, an objection to the validity of the discharge, upon the ground of want of jurisdiction, or for any of the causes specified in the 40th section of article 3 (3 *Rev. Stat.*, 5 ed., 98) could not be determined on a motion like this. The discharge is declared by statute to be conclusive evidence of the proceedings and facts therein contained (3 *Rev. Stat.*, 5 ed., 112, art. 7, § 19); and in the 37th section of article 3 (3 *Rev. Stat.*, 5 ed., 98) provision is made for pleading the discharge in bar of any action brought to enforce a claim affected by it. In consequence of which provisions it has been held repeatedly, that the question of the validity of a discharge cannot be inquired into upon a motion or trial by affidavits. (*Reed a. Gordon*, 1 *Cow.*, 50; *Reynolds a. Manning*, *Ib.*, 228; *Noble a. Johnson*, 9 *Johns.*, 259; *Cole a. Stafford*, 1 *Cai.*, 249; *Taylor a. Williams*, 20 *Johns.*, 21.) If the plaintiffs wished to test the validity of the discharge, they should have brought an action upon their judgment, where, upon the defendant's pleading the discharge in bar, they could go behind it, and show that the officer had not acquired jurisdiction, or impeach it for any of the causes which would under the statute make it void. In this proceeding it is conclusive, and the motion must be granted.

* Present, DALY, F. J., HILTON and BRADY, JJ.

Stuart a. Salhinger.

upon affidavit. (Russell a. Packard, 9 *Wend.*, 431; Reed a. Gordon, 1 *Cow.*, 50; Reynolds a. Manning, *Ib.*, 228; Noble a. Johnson, 9 *Johns.*, 259; Lester a. Thompson, 1 *Ib.*, 300; Taylor a. Williams, 20 *Ib.*, 21; Cole a. Stafford, 1 *Cai.*, 249.) And there is nothing in the mode of procedure adopted in Cramer's case in conflict with the previous decisions.

The statute declares that the discharge shall be void in certain cases. It provides that the discharge may be pleaded in bar of any action for a debt due at the time of the assignment, or contracted before, though payable afterwards; but it does not follow from this that the only mode in which the question of the invalidity of the discharge can be raised, where the debt is in judgment, is by an action upon the judgment. In Deyo a. Van Valkenburgh (5 *Hill*, 242), an action of false imprisonment was brought for arresting the defendant in the judgment upon a *ca. sa.*, after he had been discharged upon the Two-thirds Act; and it was conceded by the court, that the defendant in the action might set up by way of defence, that the discharge was void for any of the reasons specified in 2 Rev. Stat., §§ 23, 35. It was said in this case, that the refusal to try such a question upon affidavits was referable "to a rule of practice which distrusts the force of such proof, and turns the party over to a more satisfactory mode of examining the question." This is attained by ordering issues to be framed, where it presumptively appears that the discharge may be successfully assailed, and directing them to be tried before a court and jury. If the creditor has a judgment, and the discharge is void for any of the causes specified in the statute, there is no reason why he should be delayed in collecting his debt, and turned over to an action upon his judgment. He levies at the peril of having the discharge interposed, either in the form of an action against him for trespass, or in an application to the court to set aside the levy, which will be granted, unless he can satisfy the court that he ought to be allowed to go on, and establish the invalidity of the discharge. If he satisfies the court upon this point, the question can be tried as effectually in the mode provided by the order of Judge Brady, as by an action upon the judgment. The rights of the defendant are as fully protected by proceeding in this way as by resorting to the remedy by action; while, if the plaintiff succeeds in overturning the dis-

Sarsfield *a.* Van Vaughner.

charge, he has been, as he ought to be in such a case, unobstructed in enforcing his judgment. If the discharge has been improperly procured, the debtor ought not to have any advantage from it; and though the presumption should be in his favor from the fact of his obtaining it, that presumption should not be carried to the length of compelling the creditor to bring an action upon his judgment to test the validity of the discharge, when a less dilatory, less expensive, and equally efficacious mode can be resorted to. It does not lie with the debtor to complain that his goods are levied upon, for if his discharge is valid, he has the same remedy against the plaintiff that he would have against any other trespasser; or if he does not wish to bring an action, he can have the levy discharged by a motion to the court, if there was no ground whatever for making it. The order below should be affirmed.

SARSFIELD *a.* VAN VAUGHNER.

Supreme Court, First District; At Chambers, July, 1862.

CREDITOR'S BILL.—MATTER IN DISPUTE LESS THAN FIFTY DOLLARS.

An action for equitable relief, where the matter in dispute does not exceed fifty dollars, will be dismissed.

On the repeal of a statute which repeals or modifies a previous statute or rule, the latter is revived without formal words.

Motion to dismiss the complaint.

This action, brought by Patrick Sarsfield against George W. Van Vaughner and Elizabeth Greer, was in the nature of a creditor's bill, founded on a judgment against Van Vaughner, of \$88.83, on which was due a balance of only \$31.02. Van Vaughner moved to dismiss the complaint, as involving too small a sum to occupy the court.

Ira O. Miller, for the motion.—I. Previous to the adoption of the Revised Statutes, no such action could be maintained for a sum less than ten pounds sterling, or fifty dollars. This was

*Reversed
15 app. 60
38 Barb. 44*

Sarsfield *a. Van Vaughner*.

the settled law and practice of the court in this State, as well as in England. (*Douw a. Shelden*, 2 *Paige*, 323; *Vredenberg a. Johnson*, 1 *Hopk.*, 112; *Mitchell a. Tighe*, *Ib.*, 119.)

II. Section 37 of 2 Rev. Stat., 173, increased the sum from \$50 to \$100. (*Smets a. Williams*, 4 *Paige*, 364.) The repeal of this section (*Laws of 1862*, ch. 460, § 39) does therefore manifestly restore the law to the condition in which it was at the time of the adoption of said statute; that is, all such suits below \$50 should be dismissed.

III. The adoption of the new Constitution and the Code did not alter the law in this respect, and this court is governed by the same principles that the Court of Chancery would have been in a similar case. (*Shepard a. Walker*, 7 *How. Pr.*, 46.)

IV. A judgment-creditor's bill must be dismissed unless the amount due on the complainant's judgment, and the amount of the defendant's property as claimed by the complaint, each exceeds the required sum. (*Shepard a. Walker*, *supra*; *Vaughn a. Ely*, 4 *Barb.*, 159; *Winsor a. Orcutt*, 11 *Paige*, 578.)

Robert H. Shannon, opposed.

CLERKE, J.—The former Court of Chancery never entertained an action where the matter in dispute did not exceed fifty dollars. This practice obtained by virtue of its inherent power, and without the express sanction of any act of the Legislature.

The latter by its silence recognized this power, and never attempted to interfere with it until it provided in the Revised Statutes that the Court of Chancery should dismiss every suit where the matter in dispute does not exceed the value of one hundred dollars. The only effect of this was to enlarge the amount from fifty to one hundred dollars. This provision of the Revised Statutes was repealed by the Legislature during the last session; the effect of which was to reduce the amount again from one hundred to fifty dollars.

It in no respect interferes with the power of the Court of Chancery for so long a period exercised on this subject.

It is an ancient and well-established principle, that if a statute which repeals or modifies any other statute, or a rule, is itself subsequently repealed, the first statute or rule is thereby revived, without any formal words for that purpose.

 Clark *a.* Clark.

This court, as the successor of the Court of Chancery, possesses all its powers; and I think convenience requires that the rule in question should be preserved.

The motion to dismiss the complaint is granted, without costs of action or motion.

 CLARK *a.* CLARK.

Supreme Court, First District; At Chambers, June, 1861.

PARTITION.—INFANT PARTIES.—SECURITY BY GUARDIAN.

It is irregular to institute proceedings in partition on behalf of an infant, without first obtaining the authority of the court.

In proceedings in partition, it is erroneous to allow an infant to act by guardian without security.

Application by a purchaser at a sale under a decree in partition to be discharged from the purchase.

This action was brought by William E. Clark, an infant under fourteen years of age, Thomas Clark, and Letitia Clark, against Martha E. Clark, Louis M. Clark, Victor B. Clark, Eliza Jane Clark, and Stephen P. Russel, public administrator, for the partition of a lot of land, No. 36 Sheriff-street, in the city of New York. The defendants, Louis M. Clark and Victor B. Clark, were infants under the age of fourteen years. A decree was made for the sale of the property, February 1st, 1861. The property was purchased by Carl Pohlman, who now applied to be discharged from his purchase, to have the portion of the purchase-money already paid returned to him, and compensation for his expenses in examining the title,—on the ground, among others, that no guardian for William E. Clark, the infant plaintiff, was appointed before the commencement of the action, and that there was no proof of service of the summons upon the infant defendants.

William Grigg, for the motion, cited *Matter of Marsak* (15 *How. Pr.*, 383); *Lyle a. Smith* (13 *Ib.*, 104; 8 *Ib.*, 456; 21 *Barb.*, 9; 10 *How. Pr.*, 188).

*Affirmed
6 Feb. L. J. 10*

Clark *a.* Clark.

Peter Y. Cutler, opposed.—I. It is not necessary that the guardian should give security, as he will by the terms of the decree receive no money. (*Code*, § 420; *Rule* 62.)

II. The infant defendants were served with process, but as they appeared and answered by the guardian, no proof of service was required, though it is now supplied.

III. Costs and interest, but nothing for searches, are generally allowed to a party who is discharged on his own application. (2 *Barb.*, 535; *Pleasants a. Roberts*, 2 *Mol.*, 507.)

INGRAHAM, J.—The purchaser under a decree in partition asks to be discharged from the purchase for various irregularities.

1. Because the infant plaintiff did not first obtain from the court authority to institute the proceedings. This was undoubtedly necessary, when the infant was the sole plaintiff; and so far as the rights of the infant were affected, it was equally necessary in this case. The act of 1852, ch. 277, requires such a proceeding, whenever proceedings are instituted on behalf of an infant. Before this statute, an infant could not maintain an action for partition. There is nothing in the act of 1852 which confers any authority now on an infant for such purpose, except it be obtained for him from the court previous to commencing the action.

2. It was also erroneous to allow the infant to act by guardian without security. The Revised Statutes require the guardian for an infant defendant to give security, and the act of 1852 requires a next friend to be appointed, who shall give like security.

3. The purchaser alleges no service on the infant. This would be objectionable, but the plaintiff's affidavit shows that such service was made. There are other objections, which it is not necessary now to notice. For the reasons first mentioned, the sale must be set aside, and the purchaser released from the purchase.

The 10 per cent. paid by purchaser must be refunded, and \$100 paid for expenses of purchase and costs,—such amount to be paid out of the proceeds on a resale.

Carman *a.* The Mayor, &c., of New York.

CARMAN *a.* THE MAYOR, &c., OF NEW YORK.*Supreme Court, First District; Special Term, February, 1862.*

RESPONSIBILITY OF MASTER FOR ACTS OF SERVANT.—CAUSE OF ACTION.

A master who has not taken sufficient care in employing servants suitable to the work undertaken, or who has failed to direct them properly in its performance, is liable for injuries to others arising from such neglect.

The defendants, owners of land adjoining plaintiff's, employed workmen to cut trees on their own land, but omitted to employ competent persons to superintend the work, or properly to instruct them, so that they might distinguish his boundaries.

Held, that defendants were liable for trees of the plaintiff which the workmen ignorantly cut down and removed.

Demurrer to the complaint.

The action was brought by Richard F. Carman against the city of New York, to recover \$1500 for damages to certain fruit-trees. The complaint, omitting formal parts, was as follows:

I. That the above-named defendants are a municipal corporation, duly incorporated under and by virtue of the laws of the State of New York.

II. That the said defendants, at the times hereinafter specified, were and still are the owners of all that certain tract, piece, or parcel of land, situate, lying, and being in the counties of New York and Westchester, known as the Croton Aqueduct lands, being the land upon which the Croton Aqueduct is constructed, and over and upon which the Croton water is conveyed into the city of New York.

III. That the above-named plaintiff, in and during the year 1857, was the owner in fee of all that certain tract, piece, or parcel of land, situate, lying, and being in the county of Westchester aforesaid, bounded southeasterly by and adjoining the said Croton Aqueduct lands, at or near the bridge crossing the Harlem river, known as the High Bridge.

Carman *v.* The Mayor, &c., of New York.

IV. That prior to the month of January, in the year 1857 aforesaid, there were upon the said lands of this plaintiff, near and in a line parallel, or nearly parallel, with the north-westerly line of the said Croton Aqueduct lands, seven large fruit-trees,—to wit, cherry and pear trees,—bearing very choice fruit, and of great value, as well for ornament and shade as for fruit, and that the said trees greatly enhanced the value of the said land, and that there were also near the said fruit-trees other and similar fruit-trees upon the said Croton Aqueduct lands of the said defendants.

V. That in the said year 1857, and prior to the wrongful acts of the said defendants hereinafter set forth, the said defendants, through the officers of the Croton Aqueduct Department, in the discharge of their duties in the care and management of the said Croton Aqueduct, directed their agents and servants to cut down and remove from the said Croton Aqueduct lands all the trees thereon, and employed divers agents and servants to perform that work.

VI. That thereafter the said agents and servants of the said defendants entered upon the performance of the said work so directed to be done by the said defendants, but by reason of the carelessness, unskilfulness, and ignorance of their said agents and servants, and their want of knowledge of the lines of the said Croton Aqueduct lands, and the negligence of the said defendants in not having the said work superintended, managed, and directed by competent and discreet engineers, or other persons conversant with the boundary lines between the lands of this plaintiff and those of the said defendants, the said first-mentioned fruit-trees were wholly cut down, destroyed, and carried away from the lands of this plaintiff by the said agents and servants of the said defendants, and the said plaintiff's lands were greatly damaged and injured,—to wit, in the sum of one thousand five hundred dollars.

VII. And this plaintiff further shows that heretofore, and on or about the 21st day of August, 1861, he presented in writing to the comptroller of the city of New York the claim hereinbefore set forth, upon which this action is founded, for adjustment, and that at least twenty days have elapsed since the presentation of the said claim for adjustment as aforesaid.

Carman *a.* The Mayor, &c., of New York.

VIII. And this plaintiff further shows that heretofore, and on or about the 27th day of September, 1861, and after the expiration of the said twenty days from and after the presentation of the said claim to the said comptroller, as aforesaid, he made a second demand, in writing, upon the said comptroller for the adjustment of the said claim, but the said comptroller has hitherto wholly neglected and refused to make an adjustment or payment thereof.

The defendants demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Henry H. Anderson, in support of the demurrer.

Harison & Waring, opposed.—I. This is an action in the nature of an action on the case, for damages for the destruction of fruit-trees of plaintiff, resulting from negligence of defendants and servants in the ordinary course of the defendants' business.

II. 1. The defendants are responsible for the acts of their servants while in the performance of any lawful work by them directed to be done. 2. The damage sustained in this case was done while the agents and servants of the defendants were in the act of performing the work to be done, and was intended and supposed by such agents and servants to be the work upon the lands of the defendants which they were employed to perform, and they could justify themselves to their employers, in which case the latter are liable. 3. The defendants are liable, if, in doing or causing to be done a lawful act, they do it in such a careless or improper manner, or through such careless, ignorant, and improper agents or servants, that the property of others is injured. (*Vandenburgh a. Truax*, 4 *Den.*, 464; *Lloyd a. Mayor, &c., of N. Y.*, 5 *N. Y.*, 369.) 4. The defendants are chargeable with negligence for not having the premises properly defined and staked out. 5. The allegations of the complaint do not make a case of wilful trespass: wilful trespass will not be presumed.

CLERKE, J.—This is an action in the nature of an action on the case for the negligence of the defendants' servants.

The law, in allowing a remedy of this kind, supposes some fault or dereliction on the part of the master; otherwise it would

Carman *v.* The Mayor, &c., of New York.

not make him liable for the conduct of other persons. The gist of the action, then, I presume, is the neglect on the part of the master to do what he ought to have done; and this neglect may consist either in the want of sufficient care in employing suitable persons, or in the want of that precaution in directing their labor which would prevent them from doing any unintentional injury to others. In either case, the master is equally culpable. He has not done that which he ought to have done. By his fault, a citizen has suffered an injury.

The complaint alleges that the plaintiff is the owner of land adjoining the Croton Aqueduct lands, belonging to the defendants; that there were seven large fruit-trees upon the land of the plaintiff, in a line parallel, or nearly parallel, with the northwesterly line of the Croton Aqueduct lands, and that there were near the said fruit-trees other and similar trees upon the Croton Aqueduct lands belonging to the defendants; that the latter directed their agents and servants to cut down and remove from the Croton Aqueduct lands all the trees thereon, and employed divers agents and servants to perform the work; and that the said agents and servants entered upon the performance of the work, but by reason of carelessness of their said agents and servants, and the negligence of the defendants in not having the work superintended and directed by competent persons conversant with the boundary lines between the land of the plaintiff and that of the defendants, the fruit-trees on the land of the plaintiff were cut down and destroyed.

Now, I think this alleges a sufficient legal culpability on the part of the defendants to make them liable for this act of their servants. The latter committed the act in the course of their employment, ignorantly, under the supposition that they were on the land of the defendants. The servants did it through ignorance, which proper precaution on the part of the employer would have prevented. It was plainly their duty in a case of this kind, in giving instructions to the laborers, to give them the information necessary to enable them to discriminate between the trees of the plaintiff and those of the defendants. It would not be doubted for a moment, if the defendants mistakenly supposed that the trees of the plaintiff were those on their own land, and directed the laborers to cut them down, that they would be liable. This would perhaps be a direct act

The People *on rel.* Martin *a.* Albright.

of trespass, although done in ignorance. Is it less an act of negligence, and less a legal culpability, that they failed to use the means by which the injury to the plaintiff would have been avoided? I think, therefore, that the complaint states facts sufficient to constitute a cause of action.

The demurrer must be overruled, with costs: defendants to answer in ten days, on payment of costs.

THE PEOPLE *on rel.* MARTIN *a.* ALBRIGHT.

Supreme Court, Third District; General Term, March, 1862.

APPEAL FROM COMMISSIONERS OF HIGHWAYS.—POWERS OF REFEREES. — WAIVER. — FORM OF EXCEPTIONS. — MANDAMUS. — COSTS.—RELATOR AS WITNESS.

The referees appointed by the county judge under 1 Rev. Stat., 518 (modified by Laws of 1847, ch. 455), to determine appeals from the determination of commissioners of highways, may hear and decide the appeal as well on facts existing at the time of the hearing before them as upon the facts existing at the time of the original application; and in case of reversing the decision of the commissioners, they may make such order as in their judgment the commissioners should have made.

Under 1 Rev. Stat., 514, § 58, which requires a consent on the part of the owner or occupant of cultivated lands to the laying out of a highway through his land, a verbal consent is sufficient.

A waiver, by the party for whose benefit or protection notice should be given, is equivalent to notice, and dispenses with its necessity.

A general exception to a finding of mixed law and fact does not raise the question whether the fact found is sustained by the evidence.

The allowance of costs to the relator on awarding a peremptory mandamus is not the subject of review on appeal.

An exception that the judge at trial omitted to find a particular fact is not available on appeal. The remedy is by motion to have it referred back to the judge for correction.

A relator suing in the name of the people for a writ of mandamus is a competent witness in behalf of the plaintiffs, under § 471 of the Code.

Appeal from a judgment awarding a peremptory mandamus.

The People on rel. Martin a. Albright.

The relator, Jacob H. Martin, instituted this proceeding against Isaac Albright and others, commissioners of highways of the town of New Scotland. On the 15th day of December, 1855, the relator had made application to the commissioners of highways of the town of New Scotland, in the county of Albany, to alter a highway therein, commencing at the turn of the road or highway southeast of his dwelling, and running thence in a southeasterly direction across the lands of the relator, through the unimproved lands of William Bennett, to the road that runs to New Salem. Thereupon the commissioners gave the notice required by law of the time and place of the meeting of the jury: the jury met and certified as to the necessity for the alteration, and delivered their certificate to the commissioners, who, after giving the notices required by law, determined not to alter the road as applied for: from which determination the relator appealed. Referees were appointed who reversed the determination of the commissioners, and altered the road as applied for: the commissioners refused to open the alteration, and, on the application of the relator, an alternative writ of mandamus was sued out against the commissioners. The defendants returned as reasons for not opening the alteration, that the alteration as made by the referees was not the same, or substantially the same, as that applied for; that it was laid through improved, inclosed, and cultivated lands, without the consent of the owner or occupant, and without notice to the occupant of the time and place at which the commissioners or referees would meet to decide either the original application or the appeal; and that it was a new road, and not an alteration, and should have been of the width of three rods, and not of the width of two. The relator pleaded to this return, averring that the road, as laid out on appeal, was the same, or substantially the same, as the one applied for; that the same was laid out through the improved lands of Shafer and the relator only, and that they consented to the alteration, and released all damages; that both had due notice of the time and place of meeting of the commissioners and of the referees; and that the referees by their decision altered a public highway in the town, which was of the width of two rods only, and did not lay out a new road. The cause came on to be tried before Mr. Justice Gould at the Albany Circuit, 1861, and he decided all of the issues in favor

of the relator, and ordered a peremptory mandamus with costs. From that judgment the defendants appealed to the general term. The various questions reviewed are fully stated in the opinion.

Lyman Tremain, for the appellants.

Ira Shafer, for the respondent.

BY THE COURT.*—POTTER, J.—The defendants took ten several exceptions to the findings of the justice who tried the issues, founded on the pleadings to the alternative mandamus. We will examine them in their order.

First. "That the judge found that the road laid out and altered by the referees, and as set forth in the writ of mandamus, is the same road or alteration as that applied for by the relator." The eastern terminus of the new road is the same as that applied for by the relator. This seems to be conceded. Where the western terminus of the road applied for was, was a question of fact, and upon which there was a conflict of oral evidence. The written application was obscure in this particular, and oral testimony became necessary; and even with the explanation of maps, the place of beginning is about as applicable to the one as to the other of the localities claimed. The statute (§ 74) of the present highway act requires the notice of the application "to specify, *as near as may be*, the route of the proposed highway and the tracts of land through which it is proposed to be laid;" but the terms of the application itself are not required to be given; nor is the application itself required to specify the courses and distances. "Commencing at the turn of the road or highway, southeast of the dwelling-house of the undersigned, and runs thence in a southeasterly direction, &c.," is the language of the written application. There seems to be two highways, and a turn in each, about, or near to, a southeasterly direction from the relator's house; and, in a comparative sense, both near to his dwelling: one on what is called the Sygert road; the other more southeasterly, and is upon the road proposed to be altered. Unexplained by the evidence, I should, perhaps, have selected the latter, but the judge who heard all

* Present, HOGEBROOM, MILLER, and POTTER, JJ.

the evidence in the case, and decided the facts, could better determine, and has determined it; and I do not see that we can disturb his finding in this particular: and even were the weight of evidence strongly in favor of the more southwesterly of the two locations in question, there was not, in my judgment, such an extravagant or material departure from the point of termination claimed by the defendant, as to enable the court to hold, as a matter of law, that it was not substantially the same. It was the same general course; it effected the same general object. The spirit of the authorities is, that strict, technical exactness is not held to be jurisdictional to the referees; and their judgments will not generally be interfered with, if they exercise a reasonable discretion in the matter. (*Hallock a. Woolsey*, 23 *Wend.*, 328; *People a. Judges of Dutchess*, *Ib.*, 360, 363; *People a. Taylor*, 34 *Barb.*, 484.)

The powers of referees in such cases are somewhat anomalous, not strictly appellate. They may hear and decide the appeal, as well on facts existing at the time of the hearing before them, as upon the facts existing at the time of the original application (*People a. Goodwin*, 5 *N. Y.*, 568); and in case of reversing the decision of the commissioners, they may make such order in relation to laying out the road, as in their judgment the commissioners should have made. (*People a. Commissioners of Cherry Valley, &c.*, 8 *N. Y.*, 476.)

Second. "That the judge found, and decided, that the road so laid out by the referees runs through the inclosed, improved, and cultivated lands of John and Jane Shafer, with the consent of the said John and Jane Shafer."

This finding, certainly, is a finding of *fact*. So far as relates to the land of the Shafers being cultivated and improved, and so much of the finding as relates to the *consent*, it is a finding partaking of law and fact combined. There is evidence of a verbal consent, by all persons being or claiming to be occupants; and I think the law, in the absence of evidence of a revocation of such consent, sustains this as a legal finding. (See *Highway Statutes*, § 73, (59); *People a. Goodwin*, 5 *N. Y.*, 568.)

Third. "That the said Shafers had due and legal notice of the time and place at which the commissioners would meet to decide on the application of the relator, and of the time and place at which the referees would meet to hear and determine the appeal

of the relator." It can hardly be disputed, as a legal proposition, that a party may waive his right to a statute benefit, or protection; and though without an express waiver of notice, the occupant or owner of cultivated or improved lands, is entitled to the protection afforded by the notices referred to, the law does not however demand such absurd formalities to be gone through with as the actual service of notice, where the party who only is interested, himself waives or releases it. The waiver, is equivalent to notice, and dispenses with its necessity. I think this exception is not well taken.

Fourth. "That the said Shafers duly consented to the alteration of said highway as made by said referees, and that they duly released all damages that they or either of them were entitled to by reason of the same passing through their lands."

The question of *due* consent, we examined in reviewing the the second exception. If we are right in the view we took of that question, a release was entirely unnecessary, and that finding by the judge was entirely immaterial.

Fifth, "That the said judge found and decided that the said referees by their decision and determination duly altered a public highway in the town of New Scotland, and said referees did not, by said decision and determination, lay out a new road." I have regarded this exception as involving the principal question of doubt in the case. The finding is a combination of facts and of law. Whether we have all the facts in the case before us is not certified. It is certain that we have no facts to inform us where are the termini of the road purposed to be altered. Whether it begins or has one termination westerly of Jacob-street, Martin's house, and of the Sygert road, or whether at the junction or union of the Sygert road with the other westerly of Martin's house, it is the same or a different road, we are not shown by the case; and so also at the other end, whether the road proposed to be altered terminates at the road to Salem, or continues on, and how far, are very important facts in the decision of the question, whether it is an alteration of a road, or the laying out of a new road. If the highway which the relator applied to have altered extends beyond the termini of the new road as laid out, then, as both ends of the proposed improvement ran into the same road of two rods in width, it would be with great propriety called an alteration

The People *on rel.* Martin *a.* Albright.

of the same road. If both termini were upon different roads, and of different widths, it would not then be an alteration of a highway. The intention of the relator and his application was an alteration. It was an alteration that the commissioners refused, and upon the legal presumption that public officers have performed their duty, and upon taking the record made by the referees as evidence, it was an alteration of the present highway that they intended to make. This record seems to be the only evidence before us that the termini are upon the same highway. Referring to the application, the referees say: "Beginning at a point on the north side of the *present* highway," &c., and after detailing the survey, they state that "they set stakes at each angle of said lines, and also at the termination; the said line being meant for the centre of said alteration of said highway," &c. I find no exception to the effect that the judge had not sufficient evidence to sustain his finding of the fact. The exception may be intended to refer to his legal conclusion upon the facts. By the case we are not informed upon this point. It was the duty of the appellants to make this clear. If the facts are sufficient, the legal conclusion is right. We ought not to review the facts in obscurity. They are not shown to be insufficient to sustain the finding. This exception, I think, is not available to the defendants, and must be held not good for all the reasons above stated.

Sixth. The sixth exception is to the direction of the judge, that a mandamus should issue to compel the defendants to do what is therein prescribed. This exception is not good, if we are right in our view of the former exceptions. If they are overruled, this direction of the judge was right.

Seventh. The seventh exception is to the granting of costs by the judge. I think this, if not in his discretion, was an absolute right. (3 *Rev. Stat.*, 5 ed., 898, § 17; *Ib.*, 909, § 9.)

Eighth. The eighth exception is, "that the judge did not find a certain fact." The remedy for this objection is by special motion, to have it referred back for correction to the judge who tried the action. This exception is not the subject of review on appeal.

Ninth. The ninth exception is of like character with the eighth. The merits of both the latter objections are also passed upon in the review of the first five exceptions.

Wetmore *a.* Holsman.

Tenth. This exception is, that the judge did not find that this road should have been laid out three rods wide. The answer to this exception is, that he found it to be an alteration of a two-rod road. If he was right in that finding, this exception fails.

These are all the exceptions filed after the trial. On the argument, the defendants presented one other question, upon an exception taken during the trial. The relator, Jacob H. Martin, was offered on the trial as a witness, and was objected to by the defendants, as party plaintiff with the people, and not competent as a witness. The objection was overruled, and the defendants excepted. This is urged here as a good objection. This case was an issue of fact, tried in the Supreme Court (3 *Rev. Stat.*, 5 ed., 898, § 16), upon which judgment in this court is to be given. (*Ib.*, § 17.) It is called an action. (*Ib.*, §§ 18, 19.) It would have been an action at common law. (People *a.* Colborn, 20 *How. Pr.*, 380.) By the Code, as amended in 1857 (§ 399), parties "to actions and special proceedings" are competent witnesses. In this section, the Legislature "did otherwise provide," in 1857, so that section 471 of the Code does not exclude the provision of that amendment. This exception, I think, is not well taken upon the whole case. I am of opinion that judgment should be affirmed.

WETMORE *a.* HOLSMAN.

Supreme Court, First District; Special Term, March, 1862.

RESCINDING MARRIAGE SETTLEMENT.—INFANCY.—MISAPPREHENSION.—RES ADJUDICATA.

Preoccupation of mind, surprise, and a misapprehension on the part of the grantor of the legal effect of a deed, afford no ground for setting it aside, in the absence of fraud, undue influence, mistake, or error.

Trial by the court.

This action was brought by Maria M. C. Wetmore against Daniel Holsman, Charles F. Wetmore, and Katharine H. Wet-

Wetmore *a.* Holsman.

more, to set aside a marriage settlement executed by the plaintiff, in contemplation of marriage with the defendant C. F. Wetmore, to the defendant Holsman and another, in trust, on the ground of the infancy of the plaintiff at the time of executing such settlement, and of alleged misapprehensions on her part of its effect. The complaint prayed that the defendant Holsman be directed to reconvey and retransfer to the plaintiff the real and personal estate owned by her before her marriage, with all accumulations thereof, and that the defendants C. F. and K. H. Wetmore be divested of any rights or interest which they, or either of them, claimed to have acquired under the instrument. It appeared in evidence that the plaintiff had brought an action in the Superior Court of the city of New York against Holsman and another, to have the marriage settlement rescinded, on the ground of infancy,* in which action judgment had been rendered for the defendants.

John G. Vose and Edwards Pierrepont, for the plaintiff.—It is a plain proposition that, as a general rule, a conveyance of lands by an infant is not voidable, but absolutely void. No settlement resembling the one now under examination has ever been sustained, either in England or this country.

In the only instance in England, the settlement has secured to the infant some consideration out of the husband's estate, or some protection against his exercise of the rights which, but for the settlement, would have been conferred on him by the marriage; and to secure to the wife these advantages, the court have deemed it equitable to uphold the settlement. As the law now stands in England, such settlements are invalid. (*Caruthers a. Caruthers*, 4 *Brown's Ch. Cas.*, 500; *Clough a. Clough*, 5 *Ves.*, 710, 717; *Milner a. Lord Harewood*, 18 *Ib.*, 289; *Simpson a. Jones*, 2 *Russ. & Myl.*, 365.) In this State such settlements have not been sustained. (*Temple a. Hawley*, 1 *Sandf. Ch.*, 153; *Wetmore a. Kissam*, 3 *Bosw.*, 321.) There is no doubt or difficulty about the question of the absolute invalidity of the conveyance. The only difficulty arises from the notion that the wife cannot avoid it during coverture. And this is founded solely upon the language found in the earlier English

* *Wetmore a. Kissam*, 3 *Bosw.*, 321.

Wetmore *a.* Holsman.

cases, that the conscience of the husband is bound not to aid the wife in defeating the instrument, and that as she cannot act without his consent, which he cannot be allowed to give, therefore she cannot act at all.

It is found that she has given him a valuable life-estate in her property, which she had no thought of giving, nor he of receiving. It would seem that his delicacy as well as his conscience are bound to a restitution of this part. It cannot be that the court are compelled to decline for his wife the justice ready to be done for her, and to tell the husband that his conscience is bound not to aid her in resuming the estate she has been divested of by a void conveyance.

It is conceded on all hands that the wife discoverer could do all that is asked for here. It is the coverture which alone prevents.

While the fictitious notion about the husband's conscience prevailed, the whole difficulty there was, that he was bound by his conscience not to aid her, and without his aid she could not disaffirm.

Does she need his aid now? Of what force are our three statutes of 1848, 1849, and 1860, if the wife married in 1855 is still unable without her husband's aid to disaffirm a conveyance of her own property made in 1855?

If it was valid when made, his consent was not requisite; if invalid by reason of her infancy, his consent could not make it valid; neither can his inability, by reason of his conscience or otherwise, to give his consent to her disaffirmance prevent her exercising that right.

The settlement is not equitable any more than it is lawful that a woman should be deprived of her property by a written instrument signed by her while an infant, when she had no power of disposition.

John Pyne, for defendant Holsman.—I. This action is not brought to obtain relief from the ante-nuptial settlement in question, as oppressive or disadvantageous to the plaintiff, nor as having been obtained from the plaintiff by undue influence or incorrect representations, or by advantage taken of her ignorance or carelessness, although all these are alleged as naked facts in the complaint, but simply to have the said ante-nuptial

Wetmore *a.* Holsman.

agreement declared void. An infant's contracts are not void *ab initio*, especially such as relate to real estate, but are merely voidable at the option of the infant upon coming of age, and until so annulled, are valid. This is settled law. (Bool *a.* Mix, 17 *Wend.*, 119; Gillet *a.* Stanley, 1 *Hill*, 121; Eagle Fire Co. *a.* Lent, 6 *Paige*, 635; Van Nostrand *a.* Wright, *Hill & D. Supp.*, 260; Dominick *a.* Michael, 4 *Sandf.*, 374, 416; Temple *a.* Hawley, 1 *Sandf. Ch.*, 153, which is the case of an antenuptial settlement by an infant.)

II. Contracts made between persons in contemplation of marriage remain in full force after the marriage has taken place. (*Rev. Stat.*, pt. 2, ch. 8, tit. 1, art. 6, § 79.) This section is general in its terms, and does not make any exception in the case of infants. (Drury *a.* Drury, 2 *Eden's Ch.*, 39, 60; S. C., 8 *Wend.*, 297; Tabb *a.* Archer, 3 *Hen. & Mun.*, 418; Leigh *a.* Stewart, 2 *Leigh*, 76; Harvey *a.* Ashley, 8 *Wend.*, 331, *note*, per Lord Hardwicke.)

III. The contract,—*i. e.*, the trust-deed,—not being void *ab initio*, is valid and effectual until annulled by the plaintiff on attaining her majority. But at that period she was, and has been ever since, feme covert, and is accordingly incompetent to repudiate her contracts, or exercise any other act without the concurrence of her husband, who, being a party to it, is not allowed to aid her in annulling the same. (Milner *a.* Hasewood, 18 *Ves.*, 275, by Lord Eldon; Temple *a.* Hawley, 1 *Sandf. Ch.*, 153; Wilson *a.* McCullough, 7 *Harris Penn.*, 77; Leigh *a.* Stewart, 2 *Leigh*, 76.)

IV. The matter is *res adjudicata*.

V. Were the circumstances under which the trust-deed was executed such as to entitle the plaintiff to come into a court of equity for relief, such court would, before interfering, inquire and ascertain whether it were for the real interest of the plaintiff that the trust should continue or be extinguished, and would take into consideration the importance of protecting a married woman against her own acts, which may be supposed to be more or less influenced by her husband.

Benjamin Stephens, Jr., guardian *ad litem* for K. H. Wetmore.—I. The language of the marriage settlement is popular and plain. It was duly read over to plaintiff aloud, and was

duly executed by her, under her own hand and seal, and duly acknowledged so as to entitle it to be recorded. Whatever the understanding of the plaintiff may have been, as to the settlement being merely a "formal and customary accompaniment of a marriage ceremony," no such representation is alleged to have been made to her; and as no misrepresentation or concealment is charged, no imposition or fraud alleged, no undue influence or misplaced confidence pretended, the instrument cannot be impeached for a mere error of opinion.

II. This court will not set aside Mrs. Wetmore's voluntary conveyance, on her application, on the ground that she was ignorant what was its legal effect and operation. Courts do not undertake to relieve parties from their acts and deeds fairly done, with a full knowledge of the facts, though under ignorance of the law. "*Ignorantia legis non excusat.*" Everybody is bound and therefore presumed to know the law. This rule is as much respected in courts of equity as at law. (*Lyon v. Richmond*, 2 *Johns. Ch.*, 51, 60; *Storrs v. Barker*, 6 *Ib.*, 166, 170; *Crosier v. Acer*, 7 *Paige*, 137; *Hall v. Reed*, 2 *Barb. Ch.*, 500; *Dupre v. Thompson*, 4 *Barb.*, 279; *Gilbert v. Gilbert*, 9 *Ib.*, 532; *Arthur v. Arthur*, 10 *Ib.*, 9.)

III. The marriage settlement being a contract upon a valuable consideration—the marriage (the highest consideration known to the law), nothing in exchange for it is excessive or extravagant; its value cannot be ascertained in dollars. (2 *Eq. Cas. Ab.*, 585; *Bald.*, 351, 361.) Mrs. Wetmore, although a minor at the time, is absolutely bound, as to her personal estate of every species, which passed to and rested in her trustee irrevocably. There can be no question as to the power of a female infant to bind, by a settlement before marriage, her personal property. This is clearly settled. (*Simpson v. Jones*, 2 *Russ. & Mylne*, 376; *Atherley on Mar. Settl.*, 11 *Law Lib.*, 13, 24; *Roper on Husb. & Wife*, 16 *Ib.*, 21, 26; *Macqueen on Husb. & Wife*, 50 *Ib.*, 61, 62, 249, 250; *Macpherson on Infants*, 25 *Ib.*, 329, 522; *Tabb et al. v. Archer et al.*, 3 *Hen. & Munf.*, 399, 406–409; *Strong v. Wilkin*, 1 *Barb. Ch.*, 9; *Temple v. Hawley*, 1 *Sandf. Ch.*, 153, 169.)

IV. Mrs. Wetmore being still under coverture, therefore cannot maintain this action. (*Atherley on Mar. Settl.*, 11 *Law Lib.*, 21, 22, 39, 41; *Macqueen on Husb. & Wife*, 50 *Ib.*, 63, 251,

 Wetmore a. Holsman.

252; *Macpherson on Infants*, 25 *Ib.*, 329, 522; 2 *Hoverden on Frauds*, 83; *Drury a. Drury*, *Wilmot's opin.*, 207; S. C., 2 *Eden*, 73; *Milner a. Lord Harewood*, 18 *Ves.*, 275; *Roper on Husb. & Wife*, 16 *Law Lib.*, 22, 27; 2 *Leigh.*, 76; *Shaw a. Boyd*, 5 *Serg. & Rawle*, 312; *Wilson a. McCullough*, 7 *Harris* (19 *Penn.*), 77, 87; *Temple a. Hawley*, 1 *Sandf. Ch.*, 153, 168.) A provision for the offspring of a marriage, is one of the great and immediate objects of an ante-nuptial settlement; it would indeed be a most strange omission, or rather defect in the law, if the wife, exposed so long as coverture exists to marital control (an influence so subtle in its operation that no laws can be made so strict as to preclude its perversion), should, while still "sub potestate viri," be permitted to rescind the marriage settlement, and thus expose her property, and interests of possible issue, to be imperilled by the improvidence, misfortunes, and criminality of the husband, the very objects against which the settlement was designed to protect. All experience demonstrates that vesting the wife with unlimited control of her property, will place it in more jeopardy than limiting it by a judicious settlement. (*Watson a. Bonney*, 2 *Sandf.*, 405, 415.)

V. In the case before the court, one child has been born to the plaintiff, the infant defendant, Katherine H. Wetmore. The marriage settlement cannot be set aside by this court, for the child is in judgment of law a purchaser. The infant child of the plaintiff has a contingent future interest which this court cannot divest. The law will not direct a reconveyance of the settled estate to the settlor, in derogation of the interests of third parties. No decree can be made that could preclude this infant, in the event of the plaintiff's death during the lifetime of its father, from asserting its own title under the marriage settlement, in opposition to that of any purchaser or other person whatsoever. For such a proceeding no pernicious precedent can be found. (*Tabb et al. a. Archer et al.*, 3 *Hen. & Munf.*, 399, 406-409; *Shaw a. Boyd*, 5 *Serg. & Rawle*, 312; *Merritt a. Scott*, 5 *Georgia*, 563, 573; *Eaton a. Tillinghast*, 4 *Rhode Is.*, 276; *Healey et al. a. Rowan et al.*, 5 *Grattan*, 414, 430; *Watson a. Bonney*, 2 *Sandf.*, 405, 416, 417; *Dominick a. Michael*, 4 *Ib.*, 374, 419-421.)

VI. Under the present system of pleading, this act of disaffirmance must be averred in the complaint and must be proved.

The court will require to be satisfied that the act of disaffirmance alleged to have been done by the plaintiff is such as will justify it in setting aside the settlement. (*Watson a. Bonney*, 2 *Sandf.*, 405; *Wheaton a. East*, 5 *Yerg.*, 41; *Voorhies a. Voorhies*, 24 *Barb.*, 150; *Bool a. Mix.*, 17 *Wend.*, 119, 131; *Gillett a. Stanley*, 1 *Hill*, 121.)

VII. The marriage contract of an infant feme is valid by the statute laws of the State of New York, and Mrs. Wetmore cannot be relieved by this court. By the Married Woman's Act (*Laws of 1848*, ch. 200, § 4; *Laws of 1849*, ch. 375, § 3), it is enacted, that "all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place." This is an exception of such contracts made by infant femes, by a substitutive enactment, from the operation of the rules of law, which have governed them before. The words are general, including all such contracts, without distinguishing whether made by persons who were of age or under age. In the leading case of *Drury a. Drury* (*Wilmot's opin.*, 177; 2 *Eden*, 60), it was adjudged that infants are equally bound with adults, under the statute of 27 Henry VIII., even by an equitable jointure. The words of that act are, "every woman married, having jointure made, shall not claim nor have any title to dower." This opinion was approved by Justice Nelson in *McCartee a. Teller* (8 *Wend.*, 267, 275), in reference to our own statute as to jointures, which was a transcript of that of Henry VIII.

VIII. The marriage settlement is equitable and beneficial in its terms.

IX. This case has once before been submitted to the decision of the Superior Court, and the plaintiff's complaint dismissed. It is therefore *res adjudicata* and the complaint in this court must now be dismissed. (*Wetmore a. Kissam*, 3 *Bosw.*, 321.)

PECKHAM, J.—In this case there is neither allegation nor proof of any fraud or undue influence in the procurement or execution of the trust-deed. It was done with the knowledge and sanction of plaintiff's mother, and of her general guardian. In fact, the guardian was made one of the trustees, and her brother the other. There is no allegation or proof in any manner impeaching the capacity or integrity of the trustees, or

Wetmore & Holsman.

either of them; no word of complaint against their management of the estate; nothing against the conduct of the now remaining trustee, her brother.

It is said the complainant did not understand the deed when read to her; that it was done suddenly, and without reflection—when her thoughts were elsewhere. This is a very delicate and, I may say, novel ground of relief. No fraud or undue influence being pretended, no mistake alleged, no error committed, it will scarcely do to say that, although she knew the general object and purpose of the deed,—and it has substantially effected that purpose,—yet it shall be set aside because she failed to observe or remember some of the details of the deed.

The subject of executing this deed, or a deed of trust, was called to her attention some weeks prior to its execution. She assented to the proposition of putting her property in trust. On the evening prior to her marriage, it was carefully read over to her. It was executed and acknowledged the next morning. She was then within about a month of being twenty years of age, an educated, intelligent young woman. It can scarcely be alleged under such circumstances that she had not sufficient knowledge or understanding of the deed to render its execution valid. In fact, there is not a word now proved against its provisions. It is complained that her husband has a contingent life-estate in the property, in case he survives her; but she nowhere alleges or pretends that she would not have made that or an equally liberal provision. She says it was made “without her wish or consent;” careful language, not against her consent, because she says she did not understand it; not that she would not have done so, if she had understood it; no unkind feeling between the parties now; no reason why so ordinary and rational a provision should not have been made by an affectionate woman for her intended husband. She necessarily from the facts understood the deed in substance. The delivery of the deed implied from its acknowledgment before a competent officer is not disproved. The deed was produced before me. There can be no doubt of its legal delivery.

It is objected that the trustees are not authorized to borrow money by mortgage to improve the estate. I do not so understand the deed. They are expressly authorized to repair and

Porter *a.* Willet.

improve and to borrow money. Thus, they are clearly authorized to mortgage.

If money cannot so readily be borrowed on mortgage by trustees, that is an incident to all valid trusts, and is no ground for holding them invalid. But I have very little faith in the financial wisdom of improvements by way of mortgages. The increased income thus sought to be produced is frequently a mere fancy. The mortgage is always a stern fact.

In my judgment, there is nothing left of this case except the mere fact that this deed was executed by plaintiff when an infant. That question was distinctly settled between these parties in the Superior Court of New York, and stands here *res adjudicata*.

The complaint must be dismissed, with costs.

PORTER *a.* WILLET.

New York Superior Court; At Chambers, April, 1862.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.—ACTION OF REPLEVIN.—DOUBLE COSTS.

The action of replevin, in all except its form, and the additional provisional remedy provided by the Code (§ 211), remains where it was left by the Revised Statutes, and the rights arising incidentally under it must be regarded as continuing unrepealed by the Code.

In an action to obtain the delivery of personal property, the plaintiff had a verdict for the return of a portion of the property, assessed at \$200 in value, and the defendant a verdict for the residue. *Held*, that each party was entitled to costs against the other.

Appeal from an adjustment of costs.

This was an action by James L. Porter against James C. Willet, sheriff, &c., for the wrongful taking and detaining from the plaintiff of one thousand pounds of brass kettles, six barrels of sad-irons, four sets of tinnerns' tools, and two casks of hollow ware, of the value of \$750. The plaintiff claimed a delivery of

the goods, or if a delivery could not be had, then to recover their value. The defendant denied property in the plaintiff: he also denied the wrongful taking, and justified the taking, under several executions against one Thomas Smith. It was submitted to the jury to find whether the sheriff had levied upon all the goods, there being evidence that part of the goods sold by him were not in his view at the time of the alleged levy, and the jury were instructed that if they found that any part of the goods had not been levied on, the plaintiff was entitled to a return of such part, or to recover their value. The jury found a verdict for the plaintiff for the return of the four sets of tinnern's tools, and assessed their value at \$200, and damages for the detention at \$44.50, and they found for the defendant for the return of the residue of the property, and assessed its value at \$544, with six cents damages for its detention. Both parties claimed costs, and the clerk, under objection, adjusted the defendant's costs at \$321.90, being double costs in favor of a public officer.

The plaintiff now moved for a readjustment of costs.

A. R. Dyett, for the motion.—I. The defendant is not entitled to costs. The Code (§ 304) gives costs of course to the plaintiff. By section 305 the defendant is entitled to costs "in the above actions," unless the plaintiff is entitled to costs. There is no other provision on the subject of costs in actions of replevin, and nothing will be implied *expressio unius exclusio alterius* and *expressum facit cessare tacitum*. 1. Under the Revised Statutes it was held (12 *Wend.*, 285), that in such a case the court would consider the declaration as containing two distinct counts for each parcel. This was under special provision of the Revised Statutes (2 *Rev. Stat.*, 617, § 26), not reenacted in, and inconsistent with the foregoing provision of the Code. There was no such rule before the Revised Statutes. (1 *Wend.*, 277; *Grah. Pr.*, 584.) The Code has entirely remodelled the law on the subject of costs to parties. 2. The defendant there had judgment for return and damages, and so he had in *Johnson v. Fellows*, cited *infra*. Here he cannot. (2 *Rev. Stat.*, 532, § 22; *Ib.*, 530, § 16; *Code*, § 277.) 3. At that time, in replevin both parties were considered actors—a peculiarity to the action. 4. The Code (§ 385) gives the right now

to the defendant to make an offer to take judgment in any action to any effect. This would include an offer to take judgment for the property he was not entitled to take, and thus he could avoid costs. The law at the time of the decision in 12 *Wend.*, 285, contained no such provision. 5. The decision itself is ill considered and hasty. Why should not the same rule apply in *trespass de bonis*, or *assumpsit*, for two counts, and a recovery for only one? Yet, whoever heard of it? (Bull a. Ketchum, 2 *Den.*, 188.) 6. The defendant in 12 *Wend.*, 285, did not put in any avowry, but pleaded simply *non cepit*, which gave him the benefit as a public officer of any pleas he might have put in. This is not an application under the Code. There is no general issue, and no such privilege. 7. The decision professes to follow 2 *Wend.*, 632, which has no application, as it was a case of separate and distinct counts and avowries. 8. In Johnson a. Fellows (6 *Hill*, 353), the Supreme Court evidently doubt the accuracy of the decision in treating the declaration as having two counts (pp. 354, 355), and declined to follow it, but put their decision on the ground that the case should be treated as containing distinct avowries, because the defendant was a public officer, and under *non cepit* had all the benefit of special pleadings; and then there would be two distinct pleas, and then the case would come within the Revised Statutes, which requires not two counts, but two distinct issues (see the case in 12 *Wend.*, 285), and the officer was entitled to judgment for return. Here he is not. 9. The Supreme Court, in 12 *Wend.*, fell into error,—in supposing there could be two counts for one indivisible taking (repudiated in 6 *Hill*, 353; Farrington a. Payne, 15 *Johns.*, 432); and in supposing there could be two separate pleas to parts of same count—a plea must answer the whole count.

II. Pleadings in all actions are similar in construction. But, as we have shown (under 2 *Rev. Stat.*, 532, § 22; *Ib.*, § 16; and *Code*, § 277), the property not being delivered to the plaintiff, the defendant was not entitled to any verdict at all, and that part of the verdict was surplusage or erroneous, and amendable (12 *Wend.*, *supra*),—the defendant is not entitled to costs. (Briggs a. Allen, 4 *Hill*, 538.)

III. But the defendant is only entitled to single costs, not succeeding on the whole record. (12 *Wend.*, *supra*.)

IV. A motion was necessary to get these double costs, and any objection can be taken now. (2 *How. Pr.*, 127.)

A. J. Vanderpoel, opposed.—I. The issue as to the right to a portion of the property, to wit, \$544 worth, having been found in favor of the defendant, he is entitled to recover his costs. Under the Revised Statutes this right was clear, and the Code has not changed the rule. (2 *Rev. Stat.*, 617, § 26; *Seymour a. Billings*, 12 *Wend.*, 285; *Rogers a. Arnold*, *Ib.*, 288, note; *Johnson a. Fellows*, 6 *Hill*, 353; *Hull a. Halsted*, 1 *How. Pr.*, 174; *Powell a. Hinsdale*, 5 *Mass.*, 343.) The Code has not abrogated the provisions of the Revised Statutes. In *Summers a. Jarvis* this question arose before Justice Davies, May, 1856. The court gave to each party costs.* The Revised Statutes

* In *SUMMERS a. JARVIS* (*Supreme Court, First District, At Chambers, May, 1856*), it was *Held*, in a case similar to the one stated in the text, that both parties were entitled to costs.

That was an action by Susan Summers against George Jarvis and John W. Somerendyke, to recover possession of a quantity of household furniture, comprising among other articles a piano. The complaint averred that, at a time and place stated, the defendants wrongfully and illegally took, and now wrongfully detained, the property therein described, of the value of three hundred dollars. The defendants answered separately: the defendant Jarvis denying the wrongful detention and plaintiff's title, and Somerendyke, who was a constable of the city and county of New York, denying generally the allegations of the complaint. Both defendants justified the taking and detention, under an execution against one Palmer.

The cause was tried at circuit. The jury rendered a verdict for the defendant on the whole issues, excepting as to the claim for the pianoforte, which they found for the plaintiff, and assessed its value at \$100, with \$14 for its detention. The defendants claimed their costs.

Thomas B. Van Buren, for the plaintiff.

Dennis McMahon, for the defendants.—The Supreme Court, in *Seymour a. Billings* (12 *Wend.*, 285), held that in replevin, where the declaration contained only one count for a variety of articles, and a plea of property was interposed by the defendant, and the jury found that a portion of the articles was in the plaintiff, and the value exceeded \$50, and the residue in the defendant, that each party was entitled to recover costs against the other, the declaration being viewed as containing two distinct counts for the respective parcels, or the plea as a separate and distinct avowing for each parcel.

Under the Revised Statutes (2 *Rev. Stat.*, 531, §§ 53, 54; 3 ed., 619, §§ 53, 54), as expounded in *Seymour a. Billings* (12 *Wend.*, 285); *Small a. Bixley* (18 *Ib.*, 514); *Johnson a. Fellows* (6 *Hill*, 353), each party in replevin succeeding as to part of the property in dispute got costs against the other. The defendant as

Porter a. Willet.

have not been expressly repealed except as to "all statutes establishing or regulating the costs or fees of attorneys, &c. (Code, § 303.) This repealing clause affects only those provisions contained in the third title of the chapter entitled, "Of costs and the fees of officers." (2 *Rev. Stat.*, 612.) The provision under which the defendant claims costs is contained in the first title. (*Bartle a. Gilman*, 18 *N. Y.*, 260; *Dresser a. Wickes*, 2 *Abbotts' Pr.*, 460; *Kalt a. Lignot*, 12 *How. Pr.*, 535; *Decker a. Gardiner*, 8 *N. Y.*, 29; see, also, *Cuyler a. Coats*, 10 *How. Pr.*, 141.) The provisions of the Code are not inconsistent with the previous statutory provisions so as to bring the

well as the plaintiff was an actor, and as such entitled to affirmative relief and award of judgment in his favor on the roll.

The Revised Statutes (2 *Rev. Stat.*, §§ 2, 26) provided as to the award of the costs to each party when separate issues are thus decided. So that under the old practice the law was well settled, that in such case each party was entitled to costs. Has the Code abrogated that? *Dresser a. Wickes* (2 *Abbotts' Pr.*, 460) held that the provision of the Revised Statutes which awarded costs to each party on the issues on which he succeeded was not abrogated by the Code, and was still in force.

This decision is controlling in favor of our view, if this court adopt it. But does the Code abrogate that provision?

Section 303 of the Code says that all statutes establishing or regulating the costs or fees of attorneys, &c., are repealed. The meaning of that language is, that the former law of costs, so far as it establishes particular sums for particular services, and the items of costs, are abolished,—not the broad principles which regulate and control the right to costs. If that were not so, then the provisions of the Revised Statutes as to security for costs, champerty, and maintenance, are abolished, yet we have decisions that they are not abolished by the Code,—viz., *Barry a. Whitney* (1 *Code R.*, *N. S.*, 101); *Ashbahr a. Coussin* (2 *Sandf.*, 632).

In *Decker a. Gardiner*, costs were allowed to one of two defendants, where he was acquitted in an action of tort, and judgment rendered against the other defendant. The same doctrine applies in case of joint contractors, so decided in *Cuyler a. Coats* (10 *How. Pr.*, 141). Then again the defendants in this cause are as much plaintiffs as the plaintiff is herself. Therefore, they come within the spirit of section 304.

This last view is quite evident by examining sections 211 and 277 of the Code, and in fact the case of *Small a. Bixley* (18 *Wend.*, 514) decided that they were actors as well as the plaintiff.

Such, then, being the case under section 274, there must be a double award of judgment in this action on the verdict, so that in fact there will be two prevailing parties, and the judgment is the index of who is the prevailing party; and under section 303 both prevailing parties are entitled to costs.

DAVIES, J., awarded costs to each party, and directed that on the entry of judgment, such costs should be offset, and the excess only inserted in the judgment and execution.

Porter *a.* Willet.

case within § 468 of the Code. The provisions of our Revised Statutes were in accordance with the English decisions under their statute. (*Brooke a. Willet*, 2 *H. Black.*, 435; *Dodd a. Joddrell*, 2 *T. R.*, 235; see, also, *Clark a. Keith*, 9 *Hammond Ohio*, 72.)

II. The defendant is entitled to double costs on the issues found in his favor.

III. No motion is necessary to entitle a party to double costs. (*Wheelock a. Hotchkiss*, 18 *How. Pr.*, 468.)

A. R. Dyett, in reply.—The case in 1 *How. Pr.*, 174, was before the Code. The nature of the pleas or issues is not stated, and it appears, besides, the defendant was entitled to and had a verdict for part, and also an amount of rent found to be due from plaintiff to defendant. The case of *Summers a. Jarvis* is not reported, and we have no opinion before us to know the reasons of the judge, and it was but a special-term opinion. The case, I am informed, was settled. The case in Massachusetts has no application. *Dresser a. Wickes* does not touch the primary question in this case. The whole foundation of defendant's position must rest on 12 *Wend.*, 285, and 6 *Hill*, 353, and those cases are based entirely on 2 *Rev. Stat.*, 619, § 26, and the statute authorizing officers to plead *non cepit*, as before we have shown.

MONELL, J.—Upon the cases of *Seymour a. Billings* (12 *Wend.*, 285); *Rogers a. Arnold* (*Ib.*, 288, *note*); *Johnson a. Fellows* (6 *Hill*, 353), and *Hull a. Halsted* (1 *How. Pr.*, 174), the defendant is entitled to costs in this action, unless the changes produced by the Code have taken from them their weight of authority.

The action of replevin before the Code was regulated by statute (2 *Rev. Stat.*, 521), which prescribed the form of the writ, declaration, and pleas. The writ was either for the taking and unjust detention, or for the unjust detention only, or for both the wrongful taking and detention. Where the action was founded on the wrongful taking, the plea of the general issue (*non cepit*) put in issue not only the taking, but the taking in the place stated, when the place was material. Under this plea, the plaintiff was not required to show property in himself;

nor could the defendant, unless he was a public officer (2 *Rev. Stat.*, 353, § 15), prove property in himself or in a third person. Where the action was for the wrongful detention, the plea of the general issue (*non detinet*) not only put in issue the detention, but the property of the plaintiff. Under either of these pleas, if the jury found for the plaintiff, they assessed his damages, and the value of the goods; if they found for the defendant, they assessed his damages, and the value of the goods. If the plaintiff had the verdict, and the goods had been replevied, the judgment was for his damages and costs; but if they had not been replevied, he had an additional judgment for the return of the goods, or in default of a return, that he recover their value. In an action against the sheriff, whether in the *cepit* or *detinet*, if he had a verdict, and the goods had been replevied, he had judgment for a return and damages; if not replevied, his judgment was for damages and costs only. And these were the appropriate judgments under the plea of the general issue alone. A defendant, a public officer, would have to plead or give notice specially of property out of the plaintiff to authorize a judgment for the return.

Had this action been under the Revised Statutes, it would have been both for the taking and detention. The allegation in the complaint is, "that the defendant has wrongfully taken and wrongfully detains," &c. The plea of the general issue would have been both *non cepit* and *non detinet*, which would have put in issue the taking, and also property in the plaintiff, and the defendant could have proved property in himself or in a third person.

The distinction which was attempted to be drawn between actions in the *cepit* and *detinet*, if any exists, can have no force in this case, which, as we have seen, is both for the taking and detention, and it gains no additional strength from the provisional remedy provided by the Code for reclaiming property.

The verdict in this case was for the plaintiff for part of the property, "and for the defendant for the return of the residue," describing it, and assessing its value. It seems to me we are brought with great clearness within the principle of the cases to which I have referred.

The action of replevin in all except its form, and the additional provisional remedy provided by the Code (§ 211), re-

mains where it was left by the Revised Statutes. The form and name of the action is abolished, but the cause, the right, and the remedy remains to be enforced and pursued, not by the old formula, but by newly prescribed proceedings. The effect given, therefore, to the action by the courts, under the Revised Statutes, and the rights arising incidentally under it, must be regarded as continuing unrepealed by the Code.

But it is said that this splitting a declaration into two counts, as was done in *Seymour v. Billings* (12 *Wend.*, 285), was unknown before the Revised Statutes. This is not so. The revisors, in their notes to the section of the Revised Statutes referred to, say (3 *Rev. Stat.*, 2 ed., 798): "The questions presented in the preceding section have given rise to much difficulty in England. See cases well collected in the American edition of Comyns' Digest, vol. 3, p. 237, from which the preceding rules have been extracted, as being upon the whole the best guide that can be given, and preferable to the discretion given by 1 *Rev. Stat.*, 519." And they refer to several English cases where costs were given to both parties,—viz., 1 *East*, 350; 1 *T. R.*, 654; 6 *Ib.*, 602.

By the Revised Laws of 1813 (vol. 1, p. 519, § 10), costs to both parties was in the discretion of the court.

The only remaining question to be examined, is whether the Code (§ 303), which repeals "all statutes establishing or regulating the costs of attorneys, solicitors, and counsel in civil actions," has in terms or effect repealed the provisions of the Revised Statutes, under which the defendant claims costs in this action. In addition to a special-term decision (*Dresser v. Wickes*, 2 *Abbotts' Pr.*, 460), which holds expressly that this provision of the statute is not repealed by the Code, it has frequently been decided that many parts of the Revised Statutes establishing the right to costs in certain cases (not the amount) are not affected by the Code. Thus double costs to a public officer. (2 *Rev. Stat.*, 617, § 24; *Decker v. Gardiner*, 8 *N. Y.*, 29; *Bartle v. Gilman*, 18 *Ib.*, 260.) In the latter case, the court substantially held, that the "first" title of chapter 10, of part 3 of the Revised Statutes, relating to costs and fees of officers, is not repealed; and it is apprehended that many of the provisions of that title, giving or refusing costs in prescribed cases, are still in force.

But it is said that section 305, which gives to the defendant costs of course in the actions mentioned in the preceding section 304, unless the plaintiff be entitled to costs therein, must be deemed to exclude the defendant from costs in all cases where the plaintiff is entitled to them, and that therefore the provisions of the Revised Statutes giving costs to both parties in certain cases, is repealed by implication. I am not aware that this argument is new. The effect of sections 304, 305, as repealing by implication, was incidentally considered in *Dresser v. Wickes*, and must necessarily have been regarded in *Decker v. Gardiner* and *Bartle v. Gilman*. No greater effect can be given to sections 304, 305, than to section 303. All these sections relate to the costs or fees of attorneys, and excepting so far as they and other parts of title 10 of the Code fix the rate of compensation allowed to the party, they do not affect or repeal the right to costs in certain cases conferred by the Revised Statutes.

An argument was made from the seeming difficulty in adjusting costs to both parties in one action under the Code. If such a difficulty exists, which I cannot see, it may be a good reason to address the Legislature for a repeal or modification of the existing law, but cannot, unless it is insurmountable, affect the judgment of the courts. But no such difficulty exists. The rate of costs to a party is as clearly defined now as it was under the old "fee bill;" and although it may seem disproportionate, it affords no reason for supposing that the Legislature did not intend to give it.

As the right to "double" costs in this action was abandoned by the defendant under direct authority against it, the amount must be adjusted accordingly. In all other respects the motion for a retaxation must be denied.

As this is a new question, no costs are given on the motion.

SPRINGSTEED *v.* LAWSON.

Supreme Court, Third District; General Term, May, 1862.

UNITING CAUSES OF ACTION.—BREACH OF WARRANTY.—FRAUD
AND DECEIT.—EXCEPTION.—LATITUDE ON CROSS-EXAMINATION.
—UN SOUNDNESS OF HORSE.

The causes of action arising out of the same transaction, under § 167 of the Code, must be consistent with, not contradictory to each other

Thus, a cause of action for fraud and deceit in concealing the defects of a horse purchased by plaintiff, cannot be united with a cause of action for breach of a warranty of soundness given on the sale.

A mere cold, controllable by ordinary remedies, not affecting the general health or usefulness of a horse, is not an unsoundness.

Where a charge to the jury is susceptible of two constructions, the one warranted by the case, the other erroneous, a party cannot take advantage of his exception, without presenting the modification necessary to free the charge from ambiguity.

It is proper to prove by the cross-examination of a party offering himself as a witness on his own motion, any facts that impeach his evidence.

In an action to recover damages for fraud and deceit in concealing the defects of a horse purchased by plaintiff from the defendant,—*Held*, that on cross-examination of plaintiff, defendant might show that plaintiff had disposed of the horse, after owning it for a few months, at the price for which he bought it.

Appeal from a judgment and motion for a new trial on the ground of the misconduct of jurors.

This action was brought by William W. Springsteed against Peter Lawson, to recover \$325, for breach of warranty, and fraud in the sale of a horse. The complaint was as follows:

"Plaintiff complains of the defendant for that, on or about the 29th of October, 1859, at the city of Albany, the said defendant then and there sold the said plaintiff a certain young horse for the sum of four hundred dollars, and then and there, falsely and fraudulently, warranted the said horse was then free from cold, and in every respect sound and all right, except the scratches on the hind leg; and in consideration of the premises, and relying upon the representation and warranty aforesaid, the

Springstead v. Lawson.

said plaintiff undertook and promised to pay the defendant for said horse the sum of four hundred dollars, and gave the defendant plaintiff's note for the same. Plaintiff further avers that said horse was, at the time of said sale and delivery, diseased, unsound, unhealthy, wind-broken, and had the heaves, of all which facts the said defendant had notice and cognizance. By reason of which premises the said horse was worth three hundred and twenty-five dollars less than he would have been if he had been in the condition defendant warranted and represented him to be; and plaintiff, by occasion of said fraudulent representations and fraudulent warranty and deceit, has sustained damages to the amount of three hundred and twenty-five dollars, for which amount plaintiff demands judgment against the defendant with costs." The answer was a general denial.

The plaintiff's counsel in opening the cause to the jury claimed to recover on the ground of fraud and deceit, and that if the plaintiff should fail to prove the *scienter*, that he could recover upon proof of the warranty and breach; whereupon the defendant's counsel insisted that the plaintiff, according to the pleadings, must show fraud or deceit on the part of the defendant. The plaintiff's counsel, after discussion, elected to try the cause on the ground of deceit and a fraudulent warranty. The plaintiff purchased the horse the 29th of October, 1859, for the sum of \$400, at the city of Albany, and sold him at the same place on the 12th of January, 1860, for the same sum, as was shown, under objection, on the cross-examination of the plaintiff.

The plaintiff requested the court to charge the jury, that if they found that the defendant at the time of the sale of the horse warranted him sound in every respect, except the scratches, and they should find the horse was not then sound with that exception, the plaintiff was entitled to a verdict for the breach of warranty merely, notwithstanding they should find the defendant did not know of the unsoundness at the time of the sale. The court refused so to charge the jury under the pleadings, and because of the basis on which the trial had been conducted under the plaintiff's opening, to which decision the plaintiff's counsel excepted.

The court, upon the defendant's request, among other things, charged the jury that if they found the horse, at the time of the sale, had a mere cold, controllable by ordinary remedies, it was

Springstead *a. Lawson*.

not such an unsoundness as to constitute a breach of a general warranty of soundness, to which charge and decision the plaintiff's counsel excepted. The defendant had a verdict; the plaintiff appealed.

Solomon F. Higgins, for the appellant.

Israel Lawton and *Ira Shafer*, for the respondent.

BY THE COURT.*—PECKHAM, J.—This is an appeal from a judgment entered on a verdict for the defendant at a circuit in Albany. The case is heard on exceptions, and a motion for a new trial on account of misconduct in the jury comes on at the same time by order of the special term where that motion was first made.

The first ground relied upon in the exceptions is, that the court erred in refusing to charge that the plaintiff might recover in this case without proving fraud. The complaint in this case contains all the elements of two distinct separate causes of action—a breach of warranty, and also fraud in the sale of a horse. Though perhaps within the spirit of the Code (that all actions arising out of the same transactions may be joined), these causes might have been united, yet that having been long since settled the other way, it is not advisable to review it. (*Sweet a. Ingerson*, 12 *How. Pr.*, 331.)

The plaintiff was then called upon to elect, and he plainly gave the court to understand that he elected to make this a complaint for deceit and fraud in the sale. After the proof had been closed, and the trial had proceeded throughout upon the basis of its being an action for fraud, it was quite too late to change position, and then claim it to be an action simply for breach of warranty. The court very properly held the plaintiff bound by his election. The charge was also unobjectionable as to a cold, controllable by ordinary remedies, not being in this case such an unsoundness as to constitute a breach of warranty. I should have understood at the trial, that the judge intended by this charge to say that if the horse had a mere common cold, not affecting his general health or his use, the plaintiff could not recover. If the charge was not so understood, the plaintiff

* Present, HOGEBOM, PECKHAM, and MILLER, JJ.

McClelland *a.* Remsen.

should have asked for its modification, which he omitted to do. He can scarcely be allowed to take up a single separate sentence, capable of being differently understood, and except to it, without presenting the modification he claimed. Understood as I think the court intended his proposition, there was no case made by the evidence for any verdict or damages.

The last point made to reverse the judgment is, that the court erroneously allowed the defendant to prove, on the cross-examination of plaintiff, the price for which he sold the horse in the winter after the purchase by plaintiff. This was entirely unobjectionable on cross-examination. The plaintiff on direct examination had sworn that the horse was worth but \$125 when he bought him, and would have been worth \$500 if he were as warranted. There was no pretence of any change in the horse for the better, from the time of his purchase to the time of the sale by plaintiff. It was then entirely proper to prove, by a cross-examination of the plaintiff, any facts that impeached his evidence. This fact certainly had that tendency very strongly. It was therefore competent.

As to the motion on the ground of irregularities in the jury, assuming that good cause is shown in the moving affidavits for the motion, they are very fully answered by the opposing papers.

The motion is denied with ten dollars costs, and the judgment is affirmed.

McCLELLAND *a.* REMSEN.

Supreme Court, Second District; General Term, May, 1862.

**AUTHORITY OF ONE PARTNER TO SELL PARTNERSHIP PROPERTY.—
ASSIGNMENT BY AN INSOLVENT.—FRAUDULENT INTENT.**

An assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the debtor or his assignees, is in effect a mortgage, and where the debt which it is designed to secure is paid, the property reverts to the original owner.

In such an assignment, the reservation of the surplus to the debtor is not evidence of a fraudulent intent towards other creditors.

*3 ad. Dec. 7
5 ad. N.S. 20
3 days, 407*

McClelland *v.* Remsen.

The authority of one copartner to sell the copartnership property to a particular creditor or creditors in payment of their debts is well settled. This authority extends to assignments for antecedent debts, as well as for debts thereafter to be contracted on account of the firm.

Motion for judgment upon a verdict.

This was an action by William McClelland against George Remsen, sheriff of Kings county, to recover damages for the conversion of personal property. The facts are stated at length in the opinion.

James Troy, for the plaintiff.

Nathaniel F. Waring, for the defendant.

BY THE COURT.*—BROWN, J.—William McClelland and one Elizabeth Hasluck, a married woman, were copartners in the business of selling wines and liquors of various descriptions, at the corner of Myrtle Avenue and Pearl-st., in the city of Brooklyn, under the name and firm of Wm. McClelland & Co. The plaintiff, John McClelland, was a creditor of the firm, his debt being \$357, for goods sold and delivered on June 2d, 1860. An instrument in writing was executed and delivered to the plaintiff, bearing date on that day, and purporting to be made between William McClelland and Elizabeth Hasluck, copartners, under the name and firm of William McClelland & Co., of the first part, and John McClelland, of the second part. It recited the existence of a debt for \$357 to John McClelland, their inability to pay it, and their willingness to assign the copartnership property for the benefit of the creditor. It then proceeds to assign over the goods, merchandise, accounts, choses in action, and effects of the firm to the plaintiff, upon the trust to sell and convert into money, either at public or private sale, and to collect the debts and choses in action, pay all reasonable expenses and costs of executing the assignment, and with the residue pay the debt due to the plaintiff of \$357, with the interest, and then to pay whatever may remain of such moneys, if any, to the parties of the first part to the said instrument. This paper was executed under seal by William McClel-

* Present, BROWN, SCHREUGHAM, and LOTT, JJ.

land, in the name of William McClelland & Co., but there was no evidence that Elizabeth Hasluck, the other partner, assented to it, or was made aware of its execution at the time. The plaintiff took the actual possession of the assigned property within a few days of the date of the instrument, and had such possession at the time the defendant or his officer made the levy hereinafter referred to. On the 20th of June, 1860, Elizabeth Hasluck confessed a judgment in this court to one William F. Howe, for the sum of \$605, which was duly docketed on the same day, and two days thereafter an execution upon the same was put into the hands of the defendant, George Remsen, sheriff of Kings county, who seized and sold the goods in question, realizing therefrom, after deducting his fees, \$289.90. The plaintiff thereupon brought this action, to recover the value of the goods, which was tried before Mr. Justice Lott, at the Kings Circuit, and where the foregoing facts appeared from the evidence. A motion was made upon the trial for a nonsuit, which was denied. The judge then directed the jury to find a verdict for the plaintiff; to which direction the counsel for the defendant excepted. The jury found a verdict accordingly for the sum of \$394.55, the amount of the indebtedness of William McClelland & Co. to the plaintiff, with the interest. The exception was ordered to be heard in the first instance at the general term.

The existence of the debt from the firm of William McClelland & Co. to the plaintiff was not disputed upon the trial, so that the relation of debtor and creditor between the parties to the deed of assignment was fully established. The cases distinguish, and there is an obvious distinction in principle, between an assignment by a debtor of his property to trustees upon trust for the payment of particular and specific debts, reserving the surplus to the debtor, and an assignment by a debtor of his property and effects to his creditor upon the trust to sell and pay his own debt, reserving the surplus to the debtor or his assigns. The latter is in effect a mortgage; and when the debt which it is designed to secure is paid, the property reverts to the original owner. The surplus is always within the reach of the other creditors, and can by a creditor's bill, or proceedings supplementary to the execution, be attached and appropriated to the payment and satisfaction of their debts. Such a disposi-

tion of a debtor's estate is therefore free from the weightiest objections against assignments upon trust to third persons for the payment of debts. There is no trustee interposed between the creditors and the property of their debtor. The assignee does not acquire entire legal interest in the property conveyed subject to the trust, but a specific lien upon it, and the property is still subject to the process of the courts, and may, subject to the lien of the mortgage-creditor, be devoted to the satisfaction of the other creditors' debts. When property is assigned and transferred to a creditor to secure the payment of a debt, the surplus, without any special reservation in the deed, would revert to the assignor the moment the debt was paid, and the purpose of the conveyance accomplished. A special reservation can do no more, and it is not evidence of a fraudulent intent. The law regards mortgages, and grants and conveyances in the nature of mortgages, to secure antecedent debts, with no disfavor, and, under proper limitations as to possession and notoriety, they are constantly upheld. Assignments of property upon trust to pay debts, giving preferences, have never been favored by the courts, and will only be upheld when they fulfil the conditions which the law finds it necessary to prescribe for the prevention of fraud. Among these are, that the debtor shall devote all his property to the satisfaction of his debts without condition or qualification, and that he shall reserve nothing from the assigned property to himself until all his creditors are paid. He may prescribe the order in which payments shall be made, giving preferences to favored creditors, but if he reserves any part of the estate to his own use, or for the benefit of himself in any way, until the debts of all his creditors are satisfied, the assignment will be adjudged fraudulent *per se*, and absolutely void. For authority as to one class of these cases, see Goodrich *v.* Downs (6 *Hill*, 438); Barney *v.* Griffin (2 *N. Y.*, 365). And for authority as to the other class, see Leitch *v.* Hollister (4 *Id.*, 211). In the latter case, the court, in speaking of assignments made to creditors themselves for the purpose of securing their own debts, say: "The conveyance, whatsoever may be its form, is in effect a mortgage of the property transferred; a trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument, or left to

implication, is immaterial. In view of these authorities, there is nothing vicious or illegal in the form of the instrument under which the plaintiff claims to recover the value of the property.

The remaining question in the case arises upon the power of one partner to assign over and transfer to a creditor the partnership effects in payment of, or as security for, the payment of his debt. Elizabeth Hasluck did not unite in or assent to the executing of the deed of assignment, but it was the act of William McClelland solely. It cannot escape notice in this connection, that while the plaintiff claims the property under an instrument made in the name of the firm by one copartner, the defendant claims to hold it under an execution issued upon a judgment confessed by the other copartner. Still, the legal problem remains to be solved by the aid of principle or authority. The right of one partner to make a general assignment of the copartnership effects to a trustee for the payment of debts, giving preferences, has been denied by very competent and respectable authority, and probably does not exist. It may still be regarded as an open question, not having yet passed the ordeal of the court of last resort in this State. But the authority of one copartner to sell the copartnership property to a particular creditor or creditors in payment of their debts, has been judicially determined, and is now the settled law. The power of a partner to dispose of the property of the firm extends to assignments of it as security for antecedent debts as well as for debts thereafter to be contracted on account of the firm. Lord Mansfield, in a celebrated case (*Fox v. Hanburgh, Cowp.*, 445), decided that even after an act of bankruptcy committed by one partner, an assignment *bona fide* of partnership effects by the solvent partner to a creditor of the firm in payment of his debt was binding on the firm. (*Collyer on Part.*, 395.) Mabbett *v.* White (12 *N. Y.*, 442) decides that one copartner has authority to sell and transfer all the copartnership effects directly to a creditor of the firm in payment of a debt, without the knowledge or consent of his copartner, although the latter is at the place of business, and might be consulted. Nor is the validity of the sale affected by the insolvency of the firm at the time, and the preference which the purchasing creditor will thus acquire over the others. If I am right in thinking the instrument of assign-

Hoffman *a.* Van Nostrand.

ment made by William McClelland, in the name of the firm of the plaintiff, a mortgage, or an instrument in the nature of a mortgage, then it is within the principle of the decisions referred to, and is effectual to pass the title to the goods for all the purposes of this action to the plaintiff.

Judgment should be entered upon the verdict for the plaintiff.

HOFFMAN *a.* VAN NOSTRAND.

Supreme Court, First District; At Chambers, May, 1862.

CHANGE OF ATTORNEY.—LIEN FOR COSTS.

A party in an action has no right to change his attorney without leave of the court. The court before granting this leave will consult the rights of the attorney, and will not allow the change until the just claims of the latter are discharged or secured.

Where the action was commenced and prosecuted in the name of the plaintiff, for the benefit of another person, and the attorney did not claim costs from the plaintiff, but from the real prosecutor,—*Held*, that the plaintiff could not change his attorney without satisfying the attorney's claim for costs.

Motion for a substitution of attorney.

The plaintiff, Joseph Hoffman, assignee of one Willcox, brought this action against James Van Nostrand and eight others, the surviving trustees of the Merchants' Exchange Bank, for an accounting and for the delivery of to him of forty shares of stock in the Firemen's Insurance Company. The action was referred to Hamilton W. Robinson, Esq., who reported in favor of the defendants. The plaintiff appealed. The costs of the plaintiff's attorney not having been paid, he, after notice to the parties interested, suffered the judgment to be affirmed by default. The plaintiff now applied for the substitution of another attorney. The attorney opposed the motion on the ground that his claim for services had not been paid. The plaintiff offered evidence that the attorney had no claim against him for the costs, but was to receive his compensation from another party, who was interested in the suit.

A. H. Dana, for the motion.—I. It is the right of the client to appoint or change his attorney at his own pleasure. (*Abbotts' Dig., Attorney and Client; Dunlop Pr.*, 82; 5 *Cow.*, 446.) In chancery the client was allowed to change his solicitor, and it was held no objection that costs were not paid, nor would the court make it a condition that the costs of the original solicitor be first paid. (13 *Ves.*, 195; 3 *Edw.*, 340.)

II. This right is subject only to the equity which the attorney may have. This may be classed under two heads. 1. An attorney who has prosecuted a case has a lien upon the papers in his hands. Yet this lien is subject to the equitable control of the court, and where it shall deem just, the attorney will be compelled to produce the papers. (*Barry a. Whitney*, 3 *Sandf.*, 696.) 2. The right which accrues upon recovery of judgment. This is limited to the costs of the attorney, and it is held that he has a lien upon the judgment for his costs, yet that it will not prevail against the defendant in the judgment, unless he has had notice that the attorney claims a lien. (*Power a. Kent*, 1 *Cow.*, 172.)

III. The attorney's lien upon a judgment, whatever it may be, is only when the judgment is in favor of his client. If judgment is recovered by the other party, there is of course nothing upon which there can be a lien.

IV. This motion is made after judgment has been obtained by defendants on report of the referee, and that judgment has been confirmed by the general term on appeal. The judgment at general term was obtained by default of plaintiff's attorney, but that makes no difference in the actual condition of the case. Plaintiff's attorney refused to argue the case, or to allow other counsel to do so. The effect of this conduct is obvious; there is nothing upon which a lien can attach. Judgment has been rendered against plaintiff, and the attorney refuses to do any thing, or allow any thing to be done. The rule is, that after judgment, the attorney has no longer authority in the cases. (*Lusk a. Hastings*, 1 *Hill*, 656.)

V. The court will look carefully to the conduct of attorneys with clients; even under the Code, this supervision is exercised for the protection of the client.

VI. The state of this case is substantially this: Judgment has been rendered against plaintiff, and all his efforts to get a

Hoffman *a.* Van Nostrand.

new trial, or reversal of the judgment, has been prevented by the attorney. Whatever may have been his agreement as to costs, his conduct has been unconscionable, and this motion to change the attorney ought to be granted without conditions.

James C. Carter, opposed.

CLERKE, J.—A party in an action has no right to change his attorney without the leave of the court. (Macpherson *a.* Robinson, 1 *Dougl.*, 217; Fourt *a.* Daysell, 13 *Ves., Jr.*, 196; Mumford *a.* Murray, *Hopk.*, 369.) The court undoubtedly will grant this leave at the request of the party; but in doing so it will consult the rights of the attorney, and will not allow the change until the just claims of the latter are discharged or secured. But it is contended in the present case that the attorney undertook the management of the suit without looking to the plaintiff for his compensation, depending solely upon a proportion of the proceeds in case the plaintiff should succeed. I see no evidence of this. He did indeed promise not to seek compensation personally from Hoffman. But the action was commenced and prosecuted for the benefit of another person, who, with the consent of Hoffman, used his name. This person employed the attorney, and after Hoffman called upon him, expressing his apprehensions that he would be liable for the costs, he wrote to Hoffman, stating that he would not claim the costs personally from him.

But this is no reason why the party who is really interested, and who employed the attorney, should not pay him the costs that he has actually earned for his benefit. The attorney makes no demand personally against Hoffman, but asks the court, before another attorney should be substituted, to require as a condition of such substitution, that his costs shall be paid.

Motion granted, on the payment of the costs which have been earned by the attorney.

CORNING a. THE GLENVILLE WOOLLEN CO.

Supreme Court, First District; At Chambers, May, 1862.

SUPPLEMENTARY PROCEEDINGS.—RIGHT OF A STRANGER TO NOTICE.

A stranger to the action, who has a lien upon a fund sought to be reached by supplementary proceedings, is not entitled to notice of the proceedings, or to be made a party thereto.

Motion by a creditor of the defendant to be made a party to supplementary proceedings.

This action was brought by Jasper and Edwin Corning against the Glenville Woollen Co. Judgment was recovered by the plaintiff, who subsequently instituted supplementary proceedings, and in aid thereof procured an order for the examination of Ripley H. Cameron, under section 294 of the Code, in whose hands was property of the judgment-debtor. R. H. & J. G. Isham, judgment-creditors of the company, claimed to have a lien on this property, by virtue of an attachment which they supposed prior to that of the Cornings. They now moved to be made parties to the supplementary proceedings, or that notice of further proceedings might be given to them.

Henry Whittaker, for the motion.

Cummins, Alexander & Green, opposed.

MASON, J.—If the plaintiff Isham obtained a valid prior lien upon any of the property which Corning seeks to reach by his proceedings supplementary to execution, such lien cannot be divested by these proceedings supplementary to execution, and I do not know of any practice which would justify this motion, or which will require Corning in his proceedings supplementary to execution to make Isham a party, or to serve him with notice of his proceedings.

This motion must be denied, with \$10 costs.

TOWNSEND *a.* NEWELL.*Supreme Court, First District; At Chambers, May, 1862.*JUDGMENT AGAINST JOINT-DEBTORS.—FORM OF SUMMONS TO SHOW
CAUSE.

The summons, provided by section 375 of the Code, requiring one or more joint defendants not originally served with process, to show cause why they should not be bound by the judgment, should merely require such defendants to show cause within twenty days after its service. But specifying a time and place does not vitiate.

Summons to show cause why two joint-debtors, against whom judgment had been entered, should not be bound by the judgment.

This action was brought in 1852, by Henry D. Townsend against Lindley Murray, Jr., and Stewart Newell, surviving partners of the firm of William Tyack & Co., upon an acceptance. The summons and complaint were served only upon Murray, Newell being at that time a non-resident. Judgment had been entered in form against both defendants in 1856. In 1862 plaintiff served upon defendant Newell an affidavit setting forth the facts, and a summons as follows:

(TITLE OF THE CASE.)

To the defendant Stewart Newell: On the annexed affidavit, you are hereby summoned and required to show cause before one of the justices of the Supreme Court, at a special term thereof, to be held at the city hall, in the city of New York, at chambers, on the 17th day of February, at twelve o'clock, why you should not be bound by the judgment obtained in the above-entitled action against Lindley Murray, Jr., your co-defendant and joint-debtor, on the draft upon which suit was brought. Judgment entered in the above-named court for \$1260.03; entered February 25, 1856, which remains unpaid, and for such other and further order as to the court shall seem meet.

(DATE AND SIGNATURE.)

The summons and affidavit were served more than twenty days before the return-day mentioned in the summons, and the plaintiff now moved for an order that the defendant Newell be bound by the judgment, &c.

Henry D. Townsend, plaintiff, in person.

Carpentier & Beach, for defendant.—This is a special proceeding given by the statute in derogation of the common law, and plaintiff must comply with the statute strictly. His summons should have required the defendant to show cause in twenty days, not in court on a subsequent day

INGRAHAM, P. J.—The summons that was served in this case is sufficient, and contains all that the statute allows. The 375th section directs that the defendant shall be summoned to show cause why he should not be bound by the judgment, in the same manner as if he had been originally summoned; and the 377th section provides that the summons should require the person to show cause within twenty days after the service of the summons.

The 378th section directs that the summons should be accompanied with an affidavit specifying the amount due, &c.

There is no difficulty in understanding from these sections what is required.

This summons does not require an answer to the complaint. For the purpose of the action, the claim is considered as established against the firm, but the defendant summoned is allowed by section 379 to set up any defence which he might have originally made to the action, except the Statute of Limitations.

The only fault with the notice served is, that it fixes a time and place for showing cause. This was not intended. The summons should merely require the defendant to show cause within twenty days after service of the summons.

If within that time the defendant answers, the case then goes on to issue and trial, like any other action.

If he does not answer, the plaintiff, in this as in the original action, may apply to the court on an *ex-parte* application, at any time after the twenty days, for the relief he is entitled to, —viz., an order that the defendant be bound by the judgment.

Whitlock *a.* Joseph.

It has been held that this proceeding is not an action, and these views, as well as the other proceedings, are fully described in *Mills a. Thursby* (2 *Abbotts' Pr.*, 432).

In *Harper a. Bangs et al.* (18 *How. Pr.*, 457), it was held to be sufficient to state in the summons what is required in these sections.

I see no difficulty on this summons, with proof of service and proof that no answer or demurrer has been received, in giving to the plaintiff an order that the defendant served should be bound by the judgment.

WHITLOCK *a.* JOSEPH.

New York Common Pleas ; General Term, January, 1861.

APPEAL IN MARINE COURT.—TIME TO MAKE CASE.

On appeal from the special to the general term of the Marine Court of the city of New York, the appellant has, in all cases, ten days after *written notice* of the entry of judgment to prepare a case or exceptions. The fact that he actually knew of the entry of judgment is immaterial.

Hence, if no written notice of the judgment is served, the appellant's time to serve his case is not limited.

On appeal from the Marine Court of the city of New York, the New York Common Pleas, on reversing the judgment, remitted the case to the Marine Court for argument.

Appeal from a judgment of the Marine Court.

This action, brought by Benjamin M. Whitlock against Aaron Joseph, in the Marine Court of the city of New York, was tried before a jury in June, 1859, and a verdict rendered for the defendant. The facts are fully stated in the opinion.

J. M. Todd, for the appellant.

C. P. Schemerhorn, for the respondent.

Whitlock *a. Joseph*.

BY THE COURT.*—HILTON, J.—From the affidavits and papers before us on this appeal, it appears that this action was tried before a justice of the Marine Court and a jury, on June 13, 1859, and a verdict rendered for the defendant. From the judgment entered upon this verdict, the plaintiff appealed to the general term of the court. On the cause being called for argument, the defendant moved to dismiss the appeal and affirm the judgment, upon the alleged ground that the plaintiff had not prepared and served his case within ten days after the trial, in accordance with the rules of the court. The extract from the minutes returned to us under the certificate of the clerk, shows that at a general term of the court, held May 31, 1860, the judgment was affirmed, with costs to the defendant. The proceedings at the trial were not examined or reviewed on this affirmance, nor are they returned to us. In lieu of them, however, we have a certificate, made by direction of the court, to the effect, that at the general term the plaintiff presented a printed case, and asked permission to use it on the argument; whereas, the motion of the respondents (the defendants) was to affirm the judgment and dismiss the appeal, which motion was finally granted. The first impression produced by this certificate is—How could a motion of this double character be granted? Certainly, a judgment cannot be affirmed upon an appeal, and the appeal at the same moment be dismissed. But such seems to have been the case here.

However, I suppose we must regard this judgment as one of affirmance, given upon a failure of the plaintiff to present on the argument any ground for reversal of the judgment he appealed from, and then inquire whether it was within the power of the Marine Court to deprive him of the right of being heard at the general term, because he had omitted to prepare and serve a case in accordance with the rules of the Supreme Court, which the Marine Court considered applicable to appeals of this character.

The jurisdiction of the Marine Court to entertain appeals was confirmed by the fifth section of the act in relation to that court, passed July 31, 1853, and which is as follows:

“Any one of the justices of said court shall have the power

* Present, DALY, F. J., BRADY and HILTON, JJ.

Whitlock v. Joseph.

to open defaults, on such terms as may be just and proper, in all actions tried before him; and an appeal may be taken upon the same from a judgment entered by a direction of a single justice of the said court to the justices thereof, at a general term, in the same manner and with like effect as appeals in the Supreme Court from the decision of a single judge to the general term, and the same costs and disbursement allowed as on appeals from justices' courts to the Common Pleas. The justices of said court may appoint general terms of said court at such time as they deem proper."

Thus, in effect, it is declared that all judgments entered upon a trial before a justice, and all proceedings upon the trial, shall be subject to review upon appeal to the general term, in the same manner as in like cases in the Supreme Court; the appeal to be taken, and when taken to be heard and determined in the same manner and with like effect as in cases of appeals to the general term of the Supreme Court, from a judgment entered upon a trial before a justice in that court without a jury. So that to enable us to determine whether the plaintiff was in this case entitled to be heard on his appeal, it is but necessary to inquire whether he conformed in all respects to the practice in like cases in the Supreme Court, which the act of 1853 (*supra*) has extended over, and made applicable to appeals to the general term of the Marine Court. By the Code (§ 327), an appeal in the Supreme Court must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment is entered, stating an appeal from the same, or from some specified part thereof, and this notice must be served within thirty days after written notice of the judgment shall have been given to the party appealing (§§ 332, 348). For the purposes of such an appeal, either party may except to a decision on a matter of law arising upon a trial of a question of fact by the court without a jury, within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury. And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may at any time within ten days after written notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions, in like manner as upon a trial by jury, and on

Whitlock & Joseph.

which the appeal will be heard by the general term (§ 268). These are all the provisions of the Code applicable to the present inquiry ; but Rule 34 of the Supreme Court declares, that whenever it shall be intended to review by appeal a trial by jury or by the court, a case or exceptions, or case containing exceptions, shall be prepared by the party intending to review the trial, and a copy thereof served on the opposite party within ten days after the trial, if by jury, or after a written notice of the filing of the decision, if the trial be by the court, and the party served may within ten days thereafter propose amendments thereto, which shall be served, and subsequently, upon notice, settled by the justice before whom the cause was tried. But by Rule 35, if the party shall omit to prepare and serve a case within the time limited, he will be deemed to have waived his right thereto ; and when a case is made, and the parties shall omit, within the time prescribed, the one to propose amendment and the other to notice the case for settlement, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to the amendments as proposed.

Thus it will be seen, that in cases of trial by jury, where a review on appeal is desired, the case or exceptions must be served within ten days after trial ; but on a trial by the court without a jury, the case or exceptions must be served within ten days after written notice of the filing of the decision of the judge before whom the trial is had : and the latter practice is alone applicable to appeals in the Marine Court, the language of the act of 1853 being, that they shall be taken "in the same manner and with like effect as appeals in the Supreme Court from the decision of a single judge to the general term ;" the object of this provision being, as it would seem, to establish a uniform course of proceeding in all cases of appeal in the Marine Court ; so that, whether the trial has been had before a justice and a jury, or before a justice alone, the ten days within which the party appealing must prepare and serve his case or exceptions do not begin to run until he has been served with a written notice of the judgment entered by the direction of the justice, and it is immaterial whether the party has or has not actual knowledge of the judgment, as his time to appeal and his time to propose a case or exceptions do not begin to

Cronnse *a.* Fitch.

run until written notice of the entry of the judgment has been actually served upon him. (*Fry a. Bennett*, 16 *How. Pr.*, 402; *Staring a. Jones*, 13 *Ib.*, 423; *Bentley a. Jones*, 4 *Ib.*, 335; *Rankin a. Pine*, 4 *Abbotts' Pr.*, 309.)

Tested then by these views, was the Marine Court right in refusing to permit the plaintiff to use upon appeal the case proposed by him?

On reference to the affidavits which were read at the general term, on the defendant's motion to dismiss the appeal, it appears that the case proposed had been served upon the defendant's attorney on August 15, 1859, and that no amendments have ever been offered thereto; and it does not appear that the plaintiff or his attorney have ever been served with a written notice of the judgment from which the appeal was taken. Therefore, the time to make the case not having been limited, it follows that its service was regular, and the defendant, by not serving any amendments thereto, must be deemed to have waived his right to do so, and to have agreed to the case as proposed. Consequently, the plaintiff upon the appeal was entitled to have the proceedings at the trial reviewed on the case so agreed on, and the Marine Court erred in deciding otherwise.

The judgment of affirmance must for this reason be reversed, and the cause sent back for argument.

CRONNSE *a.* FITCH.

Supreme Court, Third District; General Term, March, 1862.

EVIDENCE.—RES GESTA.—OPINION OF WITNESS.—PURCHASE OF
NOTE.—PROOF OF VALUE.

In an action against the indorser of a promissory note, where the defence was, that the circumstances under which the plaintiffs obtained the note amounted to a payment of it by them, for the benefit of the maker, proof that the maker had previously declared that he would borrow money from the plaintiffs to pay the note,—*Held*, inadmissible.

Cronnse *v.* Fitch.

The understanding of a witness as to the legal effect of a transaction, or of the intention of the parties, is properly excluded.

Where testimony, improperly excluded, is admitted at another stage of the trial, an exception to the exclusion becomes unavailable.

The declaration of the maker of a note, that the same is paid, not made at the time of the transaction which constituted the payment, nor made in the presence of the holder, should not be received.

A conversation between copartners, to the effect that they will make a profit by purchasing a certain note, directly followed by their advancing the amount of the note to the holder, is admissible in their own favor, as proof of their intention in procuring the note, and to determine the character of the transaction.

Where, on cross-examination, a party takes the testimony of the witness to new and collateral matter not pertinent to the issue, he is not at liberty to give evidence to contradict the witness in this respect.

Evidence of the price at which property, which has not materially deteriorated, sells at public sale, is admissible, to prove its value several months earlier.

Motion for a new trial on exceptions.

This action was brought by Conrad A. and William Cronnse, against Ebenezer A. Fitch and Peter A. Cronnse. The case was tried at the Albany circuit, before Mr. Justice Gould and a jury, January 15, 1861, and resulted in a verdict for the plaintiff, whereupon the judge ordered that the case should be heard on exceptions, at the general term, in the first instance.

The action was brought on a joint and several promissory note for \$140, dated January 14, 1856, signed by defendants, and payable to Alexander and Jacob Ogsbury, or bearer, three days after date.

Fitch answered, setting up—I. That he signed as surety for Peter A. Cronnse, and while the defendant, Peter A. Cronnse, was solvent. Fitch requested the holders to prosecute and collect it of Peter A. Cronnse, which they neglected to do, until said Peter became insolvent.

II. Payment of the note by Peter A. Cronnse.

It appeared that this note was given to Alexander and Jacob Ogsbury, for a yoke of cattle purchased by Peter A. Cronnse, and signed by Fitch, as his surety; that David H. Ogsbury acted as agent for the payees; that the plaintiffs were brothers to Peter A. Cronnse. Conflicting evidence was given as to the facts set up on the first defence. Plaintiffs came into possession of the note in December, 1856, prior to which time, and during that month, the request to prosecute had been made to

Cronnse v. Fitch.

the agent, David H. Ogsbury, by Fitch. The defendant gave evidence to show that at the time of such request, Peter was solvent, and afterwards became hopelessly insolvent, and this evidence was rebutted on the part of the plaintiff.

In December, 1856, Peter A. Cronnse kept the Clinton Hotel in Albany, and the plaintiffs, his brothers, were partners in business in Albany. After Fitch had given the notice to Ogsbury to collect the note, Ogsbury called on Peter for its payment, and the next day, Peter and Ogsbury went to the plaintiffs' store, where the plaintiffs paid to Ogsbury the amount of the note in suit. The effect of that transaction was the principal question in the case.

The defendant claimed that this was a payment by the plaintiffs of the note for their brother, while the plaintiffs claimed that it was a purchase of the note from Ogsbury. Various exceptions were taken on this branch of the case, as follows: 1. The judge excluded evidence that Peter told Ogsbury, if he would call the next morning, he would borrow the money. It further appeared that the next morning Peter said he would go and borrow the money. 2. Also, that Ogsbury understood the payment made to him by the plaintiffs as a payment of the note by them for Peter, and not as a sale of the note to plaintiffs. 3. Also, he excluded an answer to the following question to Ogsbury: "Did you ever sell that note to the plaintiffs, or either of them?" on the ground that it called for an opinion on a matter of law, and that the facts which there occurred must govern the character and legal effect of the transaction. 4. The following question was then put to Ogsbury: "Did you ever deliver that note to plaintiffs, or either of them?" which was excluded by the court, as giving an opinion as to the legal effect of his acts. 5. The judge also excluded proof, that as Ogsbury and Peter left the store, Peter sent word to Fitch that the note was paid, this being in the absence of the plaintiffs. 6. The judge allowed proof of a conversation between the plaintiffs, at the store, not in the presence or hearing of Ogsbury, and just before the payment or transfer of the note, whereby it appeared that William told Conrad, that if they had the money to spare, they had better buy the note; that they might as well have the money at interest as lying in the bank, and that Fitch was perfectly good. 7. He also re-

Cronnse *v.* Fitch.

fused to strike out this evidence, after it appeared that it was a conversation between the plaintiffs, in the absence of the defendants. 8. The plaintiffs having called Peter as a witness, and Peter having been cross-examined as to whether he borrowed the money of the plaintiffs, and as to whether he did not at that time tell Ogsbury the note was paid, and he should tell Fitch it was paid, the judge excluded evidence claimed to be impeaching evidence, that Cronnse did there say it was paid, and he wanted Ogsbury to tell Fitch so, on the ground that the evidence was incompetent, and that Cronnse's statement was conclusive, and could not be contradicted, as it was on a collateral point.

The same kind of proof, when offered to be shown by Fitch, was excluded.

The following exceptions were taken by the defendant, relating to evidence bearing on the question of Peter's solvency: 1. John McEwen having given evidence as to Peter's pecuniary circumstances, and that he sold to him in November or December, 1856, the lease, furniture, and liquors of the Clinton Hotel, for \$3,000, the judge allowed proof of what the furniture brought at public sale the following spring. 2. Peter was allowed to state whether he paid to McEwen the balance on the chattel mortgage after the sale in the summer of 1857.

Ira Shafer, for plaintiffs.

Lyman Tremain, for defendant Fitch.

BY THE COURT.*—HOGEBROOM, J.—1. The first point made by the defendant for a new trial, is the alleged error of the judge in excluding the declaration of the defendant, Peter A. Cronnse, to David H. Ogsbury, the agent of the payees, on Christmas Eve, that if he (said agent) would come the next morning, he would borrow the money. This was apparently offered to show that he would borrow the money to pay the note. I think the evidence was rightly rejected. (1.) It was the declaration of the defendant as to his intended action at a future time, designed to affect unfavorably the rights of the plaintiffs in the action. This, *prima facie*, would make it inad-

* Present, HOGEBROOM, POTTER, and MILLER, JJ.

missible. (2.) Though made to the agent of the then holders of the note, I think it was inadmissible to affect the present plaintiffs, as it did not accompany an act in regard to which the defendant had a right to inquire. If I understand the offer, it did not apply to the occasion when the agent of the Ogsburys demanded payment of the note, but to a subsequent occasion, after the defendant, Peter A. Cronnse, had requested the plaintiffs to cash the note, and they had refused. (3.) It may be doubted whether the testimony would have been admissible, even if it had occurred on the first-mentioned occasion. I do not see why the declarations of one of the defendants, made at a time when he was called on for payment, as to his intention to provide for the payment subsequently, should be admitted to prejudice the subsequent holders of the note, who claimed that such subsequent transaction was in fact a purchase by them from the previous holders instead of a payment by them for the benefit of one of the defendants. (4.) Besides, the defendants got the benefit of the offered testimony, substantially, by proving the declarations of the defendant, Peter, made the next morning, that he would go and borrow the money. This was quite as effective for their benefit as would be a declaration, made the previous evening, of his intent to do so.

2. I think the judge properly overruled the defendant's offer to prove by Ogsbury, that he understood the transaction, by which the plaintiffs claimed to have acquired a title to the note by purchase, to have been a payment of the note by them for Peter. The transaction must be judged of by the facts and declarations made contemporaneously with the transaction, or at least so near to it as properly to characterize it, and not by the opinion or conclusion of the witnesses as to the legal effect of such facts and declarations—the very conclusion which, under the law and the evidence, the jury were to draw from all the circumstances of the case, and which was the turning point of the entire litigation.

3. The same considerations dispose of the question put to the same witness, whether he sold the note to the plaintiffs. In ordinary cases, where the question was, whether certain facts really occurred or not, it might perhaps be unobjectionable to put the question in that form; but where, as in this case, the

question was whether conceded facts, or facts clearly proved, made out a sale or not, in contemplation of law, it was not improper in the judge to confine the parties in the evidence to what was strictly matter of fact, leaving to the court thereafter to apply the proper rules of law thereto. This was, perhaps, a case where a proper regard to the rights of the parties required a careful observance of this rule.

4. For like reasons, the evidence, whether the witness ever delivered the note to the plaintiffs, was properly overruled. Under the circumstances, the judge had some reason to conclude that the inquiry was designed to call out, to some extent, the opinion of the witness, and therefore properly limited the range of inquiry to pure and unmixed questions of fact, and although the judge excluded the question put as to whether the witness delivered the note, the witness went on to answer to the question first, before the judge excluded it, and secondly, after he excluded it, that he did nothing else with the note than he had previously stated; thus making it evident that all the facts bearing on the question of delivery, so far as they were within his knowledge, were before the court and jury. The defendant was not therefore legally prejudiced, and the exceptions must fail. (*People v. Wiley*, 3 *Hill*, 194, 214, 215; *Shorter v. People*, 2 *N. Y.*, 193, 204.)

5. The declarations of the defendant Cronnse, to Ogsbury, the agent of the former holders of the note, requesting him to state to his co-defendant that the note was paid, was rightfully rejected. (1.) It was not a part of the *res gesta*, the transaction having been completed. (2.) It was not made in the presence of the plaintiffs, and prejudiced their rights.

6. The most difficult question in the case seems to arise on the evidence admitted by the judge of a conversation between the two plaintiffs themselves, favoring the purchase of the note. It was apparently immediately prior to the transaction of purchase or payment, if not a part of it; but it was not in the presence of either of the defendants. I am inclined, on the whole, to think it competent. (1.) It was so near the actual transaction, that it may with some propriety be said to have been a part of it. It immediately preceded it, and doubtless led to it, and was itself preceded by a conversation with one of the defendants and the agent of the former owners of the

Cronnse *v.* Fitch.

note. (2.) It had direct and immediate relation to the object of the interview sought by the last-named persons, and materially aided to give character and point to the act of purchase or payment which followed directly afterward. Looked at in this view, it had a nearer connection with the subject in hand, and tended more clearly to throw light on it than some adjudicated cases in which the evidence has been admitted. (*Stovel v. Farmers & Mechanics' Bank*, 8 *Smedes & Marshall*, 305; *Allen v. Duncan*, 11 *Pick.*, 308-310; *Rice v. Bancroft*, *Ib.*, 469; 1 *Phil. Ev.* (Albany ed. of 1859), 185, note 80; 188, note 81.) (3.) The fact of purchase or of payment depends somewhat upon the intent of the persons advancing the money. It was not material to the Ogsburys whether the note was extinguished or transferred. It was a transaction between the holders of the note and third parties (the plaintiffs), in which the defendants (the makers of the note) were not directly concerned. I incline to think the payment of the money by the plaintiffs to the Ogsburys would, unexplained, import a transfer and not a payment of the note. The evidence, therefore, would not seem to have been injurious to the defendants, because it only favored a conclusion which was a legitimate one from the transaction itself, without this added testimony. I am inclined, on the whole, to regard the admission of this evidence as not of such a character as to demand a new trial for that reason.

7. The declarations of the defendant, Peter A. Cronnse, which, in the former part of the trial, had been rejected, as direct evidence of payment of the note, as against the plaintiffs, were in a subsequent stage of it again offered to countervail the effect of his testimony after he had been examined as a witness for the plaintiffs. They were rejected by the judge, and I think properly. (1.) On examining the testimony of Peter on the part of the plaintiffs, it would appear that they carefully abstained from asking him any question about the payment or non-payment of the note. The testimony is not therefore admissible for the purpose of impeaching his testimony as given on his direct examination. (2.) On his cross-examination, he did deny that he had told Ogsbury to tell Fitch the note was paid. But I think this did not justify the defendants in calling Ogsbury, or some other person, to contradict him on this point. It came out on the defendants' and not on the plaintiffs' exami-

Wheeler *a.* Wright.

nation ; the fact itself, whether he had made such a declaration, was a collateral and not a direct or primary fact in the case, and although it would have been pertinent enough, if on the plaintiff's direct examination he had sworn the note was not paid, yet I think the defendants could not, without examining him at all on the question of payment, call out simply his declarations on that subject, thus making him their own witness to that extent, and then claim the right to contradict him on that point by independent evidence. (See *Harris a. Wilson*, 7 *Wend.*, 57 ; *Lawrence a. Barker*, 5 *Ib.*, 301, 302 ; 2 *Phil. Ev.* (Albany ed. of 1859), 902, 903 ; *Ib.*, 970.)

8. The proof of what the furniture of the defendant, Peter A. Cronnse (whose solvency or insolvency, at the time of the request to prosecute, was a material question in the case), brought at a public sale a few months afterwards, when it appeared it had not materially deteriorated, was admissible evidence on the question of value, within the rule laid down in *Campbell a. Woodworth*, (20 *N. Y.*, 494).

I have thus considered all the material exceptions on which the defendant relies, and am of the opinion that none of them are well taken. The case seems to have been closely tried and fairly submitted to the jury, and I think their verdict in favor of the plaintiffs ought not to be disturbed.

The motion for a new trial must be denied.

WHEELER *a.* WRIGHT.

Supreme Court, Seventh District ; Special Term, May, 1862.

COSTS.—LIABILITY OF PARTY IN INTEREST FOR COSTS RECOVERED AGAINST NOMINAL PARTY.

Under 2 Rev. Stat., 619, § 44, which provides that the costs of an action brought in the name of another, by an assignee or person beneficially interested in the recovery, shall be charged upon the party in interest—applies only to cases where the assignee or party in interest is chargeable with having brought the action.

A receiver appointed in supplementary proceedings brought an action by order

Wheeler *a.* Wright.

of the court, without the interference or direction of the judgment-creditor, and costs were awarded to the defendants.

Held, that the judgment-creditor was not chargeable with such costs, on the ground that he was beneficially interested in the recovery.

Motion to compel one Eben Wheeler to pay the costs awarded to defendants.

This action was brought by John R. Wheeler, receiver, against Nehemiah Wright and William G. Wright, to set aside a conveyance of real property. Eben Wheeler had recovered a judgment against Nehemiah Wright, upon which an execution had been issued to the proper county, and returned unsatisfied, and an order for examination in supplementary proceedings made by a justice of this court, and the judgment-debtor examined. In the course of the examination, the debtor disclosed the conveyance of certain real estate to his son, William G. Wright, one of the defendants in this action. Afterwards, an order was duly made appointing the plaintiff herein receiver of such judgment-debtor, and directing him to bring an action to set aside the conveyance, and to compel an accounting by William G. Wright of the proceeds and receipts of such real estate in his hands.

This action was brought, in pursuance of such order, by the receiver. The judgment-creditor neither engaged the attorney, nor directed the commencement of the action, nor interfered with the action during its progress. The plaintiff was unsuccessful in the action, and judgment entered for the costs of defendants. An execution issued thereon against the receiver, and returned unsatisfied; and there were no assets in the receiver's hands applicable to the payment of such costs. The defendants now moved to compel the judgment-creditor, Eben Wheeler, to pay these costs, on the ground that he was the party beneficially interested in the action.

J. B. Finch, for the motion.—I. Eben Wheeler is the only person "beneficially interested" in bringing this action. Under 2 Rev. Stat., 619, § 44, any person beneficially interested is liable. (1 *Hill*, 629; 20 *Wend.*, 630; *Bliss a. Otis*, 1 *Den.*, 656.) The statute makes not only the simple assignee liable (*Norton a. Rich*, 20 *Johns.*, 475; *Schoolcraft a. Lathrop*, 5

Wheeler *a. Wright*.

Cow., 17), but "any person beneficially interested" in the recovery in such action. These terms extend to every person who holds an interest, by way of mortgage or lien, in the chose in action. (1 *Hill*, 632-3.) A person may be so liable, in consequence of being beneficially interested as a *cestui que trust*, without being either a partial or total assignee. (*Colvard a. Oliver*, 7 *Wend.*, 497.) The clause takes in every such vested interest as the courts of law will protect against the interference of the nominal party. (1 *Hill*, 632-3; *Norton a. Rich*, 20 *Johns.*, 475; *Jordan a. Sherwood*, 10 *Wend.*, 622; *Martin a. Hawks*, 15 *Johns.*, 405; *Schoolcraft a. Lathrop*, 5 *Cow.*, 17.)

II. Process in the nature of a *fieri facias* against personal property, may be issued for the collection of such costs, founded on such order of court. (*Laws of 1847*, ch. 390, § 3.) The remedy to compel Eben Wheeler to pay the costs is by motion for an order. (*Giles a. Halbert*, 12 *N. Y.*, 32; *Laws of 1847*, ch. 390, § 3.)

George M. Osgoodby, opposed.—I. 1. The effect and meaning of the section of the statute under which this application is made, depends wholly upon the question, whether the person "beneficially interested" in the recovery brought the action, as the statute only applies to cases where the action was brought by or under the direction of the person whom it is attempted to charge with the costs of the defence. (2 *Rev. Stat.*, 821, § 9; *Giles a. Halbert*, 12 *N. Y.*, 32; *McHench a. McHench*, 7 *Hill*, 204; *Whitney a. Cooper*, 1 *Ib.*, 629; *Miller a. Franklin*, 20 *Wend.*, 630; *Bliss a. Otis*, 1 *Den.*, 656; *Colvard a. Oliver*, 7 *Wend.*, 497; *Miller a. Adsit*, 18 *Ib.*, 672; *Bendernagle a. Cocks*, 19 *Ib.*, 151.) In *McHench a. McHench* (*supra*), the action was commenced by the receiver, by and under the direction of the judgment-creditor, and the motion was granted for that reason only. 2. Eben Wheeler did not bring or prosecute this action, and although he may have been "beneficially interested" in the recovery, it is a perversion of the statute to make the question of his liability for the costs depend upon his beneficial interest, when he was not instrumental in having the action brought, and in fact did not know of its being brought until after its commencement.

II. Under the statute, an assignee or person beneficially in-

terested is liable for costs only in the same cases, and to the same extent, in which a plaintiff would be liable. Now, this action being brought by the plaintiff as a receiver, under the order of the court, Eben Wheeler cannot, even if it is held he is liable, be compelled to pay the costs, except out of the assets of the judgment-debtor.

III. The many cases that have arisen under this statute to compel an assignee to pay costs of defence, have no bearing upon this motion. The various facts and circumstances shown by the papers and proceedings in this action, are conclusive to show that it was brought and conducted in good faith.

JOHNSON, J.—If this motion can be granted, it must be upon the ground that Eben Wheeler, the judgment-creditor, was beneficially interested in the recovery in the action. It must be conceded that had the plaintiff succeeded in the action, the recovery would have been for the exclusive benefit of the judgment-creditor. But this is not enough to charge a person not a party with the costs of the action. The statute (2 *Rev. Stat.*, 619, § 44; 5 ed., 3 *Ib.*, 909, § 10) relates only to actions "brought in the name of another, by an assignee of any right of action, or by any person beneficially interested in the recovery in such action." No matter to what extent the person sought to be charged, who is not a party, may be interested in the recovery, if in truth he is not chargeable with having brought the action, he is not chargeable with costs. (Giles *a.* Halbert, 12 *N. Y.*, 32; Whitney *a.* Cooper, 1 *Hill*, 629; Miller *a.* Adsit, 18 *Wend.*, 672.)

This is the only test, as shown by all these cases. Indeed, the language of the statute is too plain and explicit to admit of any other construction. This, of course, has no reference to the class of cases provided for by section 321 of the Code, where the cause of action is assigned after the action is commenced.

The motion must therefore be denied, with costs.

Purchase a. Bellows.

*Affirmed
19 Feb. 30*

PURCHASE a. BELLOWES.

New York Superior Court; At Chambers, August, 1862.

ACTION FOR CHATTELS.—RIGHT TO EXECUTION AGAINST PERSON.

On a judgment in an action to compel the delivery of specific personal property, an execution against the person can be issued only when the defendant has been arrested—under section 179 of the Code.

Under section 282 of the Code, as amended in 1862, no execution against the person can issue, unless an order of arrest has been served, or the complaint contains a statement bringing the case within section 179 of the Code.

Motion by plaintiff to set aside an execution against his person.

This action was brought by John Purchase against George F. Bellows, to recover the possession of certain personal property alleged to be wrongfully detained, with damages for its detention. Judgment was rendered in favor of the defendant for the costs of the action. After an execution upon this judgment, issued against the property of the plaintiff, had been returned, the defendant issued an execution against plaintiff's person. The plaintiff now moved to set aside this execution.

T. Stevenson, for the plaintiff.

W. Wells, for the defendant.

ROBERTSON, J.—The summons in this action is for the relief demanded in the complaint. That relief, is the recovery of the possession of certain specified property, or its value in case a delivery cannot be had, and damages for its detention. The cause of action set out in the complaint is the detention of such property, wrongfully, by the defendant.

The section of the Code, authorizing orders of arrest (§ 179), contains several subdivisions. The first provides for actions for the recovery of damages in a cause of action not arising on contract. The third, for actions to recover possession of personal

 Shearman & Hart.

property. One of the actions enumerated under the first subdivision is, where it is for wrongfully taking, detaining, or converting property. Under the third subdivision, there can be no order of arrest, unless the property has been assigned after suit brought, with intent that it should not be taken by the sheriff, or to deprive the plaintiff of the benefit of it. (*Mulvey v. Davison*; 8 *How. Pr.*, 111.) The complaint in an action under the first subdivision would show whether the plaintiff was entitled to execution against the person; if he succeeded in his action, under the third subdivision, it would not. The intent in removing the property claimed, is only to be determined by affidavits, under section 178; and the order must be made before judgment, by section 183.

The amendment passed in 1862, of section 288, provides, that no execution shall issue, unless an order of arrest has been served, or unless the complaint contains a statement bringing the case within section 179. In this case neither was done, and, therefore, the plaintiff is not subject to arrest. The law was, probably, the same before the amendment, and the latter may be regarded as merely declaratory. (*Mulvey v. Davison*, *supra*.)

The execution must be set aside, without costs, on the plaintiff stipulating to bring no action for the arrest.

SHEARMAN & HART.

New York Common Pleas; Special Term, August, 1862.

INJUNCTION.—AFFIDAVITS ON MOTION.—BURDEN OF PROOF.

A covenant in partnership articles, prohibiting either partner from continuing in any business within one block of the premises occupied by the firm, for a limited period after its dissolution, will be enforced by injunction.

Where the party opposing a motion, introduces affidavits setting up new matter, in avoidance of the allegations contained in the affidavits of the moving party, the latter has a right to introduce new affidavits for the purpose of contradicting such averments of new matter.

But the moving party will not be allowed to set up new matter in such affidavits in avoidance of the allegations of his opponent.

Shearman & Hart.

In proceedings upon a motion,—*e. g.*, an application for a provisional remedy,—the burden of proof lies upon the party holding the affirmative of each particular issue. If the party opposing the motion admits the principal allegations upon which it is founded, but sets up new matter in avoidance, the burden of proof devolves upon him.

Where the evidence or testimony of one party to the action is explicitly contradicted by the evidence or testimony of another, the party holding the affirmative of the issue must be corroborated in some manner, or fail.

Motion for an injunction.

The plaintiff, James A. Shearman, formed a partnership in the lithographic business with the defendant, Charles Hart, on March 12, 1861, which was dissolved by consent on July 2, 1862. The partnership articles provided that neither partner should "continue in business in the building occupied by the firm, nor within one block thereof, for the space of six months after the dissolution of the firm, without the consent of the other." In order to finish up the work of the firm, both partners remained on the premises for about three weeks after the dissolution, without objection on either side. The business of the concern being wound up, the plaintiff withdrew his property from the building in which they had carried on business together, and requested the defendant to refrain from doing any business there, giving him notice that he must abide by the stipulation above mentioned. The defendant refused to comply, and declared his intention to persist in remaining and doing business there. The plaintiff thereupon brought an action to restrain him from so doing, and applied for a preliminary injunction, upon papers showing the above facts.

On the hearing, the defendant admitted these facts, but alleged, in his own affidavit, that the plaintiff had agreed, as a consideration for the defendant's consent to dissolve partnership, that he might remain on the premises after the dissolution. He also alleged that the plaintiff had compelled him to consent to a dissolution, by refusing to go on with the business.

The plaintiff then offered his own affidavit made in court, denying in the fullest manner the existence of any such agreement; and, also, another affidavit, justifying his refusal to proceed with the business, by showing that the defendant had

Shearman & Hart.

acted so violently and unreasonably, that it was impossible to go on with advantage.

Thomas G. Shearman, for the plaintiff, argued that he had a right to controvert new matter, by affidavits not served with the notice of motion. He cited *Powell v. Clark* (5 *Abbotts' Pr.*, 70); *Florence v. Bates* (2 *Code R.*, 110).

F. H. B. Bryan, for the defendant, contended that the moving party could read no affidavits that were not served with the notice.

HILTON, J. (orally).—Where the opponent of a motion admits the material facts stated in the moving papers, but relies upon new matter in avoidance, the moving party may put in affidavits in denial of such matter, but cannot himself set up new matter. The first affidavit must, therefore, be admitted, and the second excluded.

The motion was then argued upon the merits.

Thomas G. Shearman, for the motion.—I. The complaint states a clear cause of action for the injunction. A covenant so mild and reasonable as this, has always been enforced by courts of equity, without the least hesitation. Nay, much more stringent covenants are so enforced. (*Story's Eq. Jur.*, § 722, *a*; *Giles v. Hart*, 5 *Jurist, N. S.*, 1381; *Whittaker v. Howe*, 3 *Beav.*, 394; see *Duncan v. Walker*, 1 *H. R. V. Johnson*, 446; *Vincent v. King*, 13 *How. Pr.*, 234; *Dunlop v. Gregory*, 10 *N. Y.*, 241; *Holbrook v. Waters*, 9 *How. Pr.*, 335.) There is no instance on record in which the court has refused an injunction in aid of a covenant so moderate as this.

II. The denial in the answer of "each and every *material* allegation not previously admitted," is frivolous. The defendant may choose to consider every allegation immaterial, and so justify himself in denying every thing, though every word of the complaint is true to his own knowledge. There is no authority for such pleading. *Voorhies' Code* (202) cites two cases in support of it, neither one of which favors it in the least degree, as will be found on examination.

III. The plaintiff is entitled to this injunction, even though the defendant had not violated the agreement. A well-founded apprehension of mischief is sufficient ground for an injunction. (*Story's Eq. Jur.*, § 862.)

IV. It is not of any importance to inquire whether the defendant meant to injure the plaintiff, or whether he acted in good or bad faith. (*Dale v. Smithson*, 12 *Abbotts' Pr.*, 237.)

V. There is abundant consideration for the agreement in question. Mutual promises are a sufficient consideration. (25 *Barb.*, 21; 6 *Ib.*, 179; 1 *Man. & Gr.*, 195; 13 *Mees. & W.*, 698; 10 *N. Y.*, 241.)

VI. A general denial is to be limited by the particular facts set up. And when an answer, after giving the history of a transaction, attempts to eke out the defects of the statement by a general denial of all that is not therein contained, such denial should be construed as merely controverting every thing inconsistent with the former branch of the pleading. (*Hatch v. Peet*, 23 *Barb.*, 575, 583; *Robinson v. Stewart*, 10 *N. Y.*, 189.)

VII. The rule that an injunction must be dissolved, if all the equities of the complaint are denied by the answer, has its foundation in the peculiar nature of chancery pleadings, and is inapplicable to pleadings under the Code. 1. The complaint in chancery detailed the evidence and all the circumstances affecting the case. (*Rochester City Bank v. Suydam*, 5 *How. Pr.*, 216; *Mechanics' Bank v. Levy*, 3 *Paige*, 606.) 2. It contained interrogatories of the most searching description, to probe the conscience of the defendant. (*Story Eq. Pl.*, § 35; *Mitford Ch. Pl.*, 44; *Mechanics' Bank v. Levy*, 3 *Paige*, 606.) 3. To all these matters of evidence and interrogatories, the defendant was bound to answer in the most explicit manner. (*Story Eq. Pl.*, §§ 852, 853; *Van Santv. Eq. Pr.*, 12; *Mechanics' Bank v. Levy*, 3 *Paige*, 606; *Miles v. Miles*, 7 *Foster*, 445.) And the defendant was thus made a witness for the plaintiff. His answer was evidence in the cause, in his own favor, as well as in favor of the plaintiff. (*Story Eq. Pl.*, §§ 849 a, 875 a; 2 *Story's Eq. Jur.*, §§ 1528, 1529.) 4. None of these things are tolerated under the Code. The complaint must contain only the facts constituting the cause of action (*Code*, § 142), not the evidence of these facts (*Wooden v. Strew*, 10 *How. Pr.*, 48; *Clark v. Harwood*, 8 *Ib.*, 470; *Williams v. Hayes*, 5 *Ib.*, 470;

Shearman & Hart.

Millikin *a. Cary*, *Ib.*, 272); much less any interrogatories to the defendant (*Clark a. Harwood*, 8 *How. Pr.*, 470). Both the complaint and answer must be concise (*Code*, §§ 142, 149), and it is thus impossible to search the conscience of the defendant, as was formerly the case. It is, therefore, settled that the defendant's answer is not evidence for him now, as it used to be in chancery; and, for precisely the same reasons, it ought not to affect the plaintiff's right to an injunction. The cases which seem to maintain a contrary doctrine are either dicta or ill-considered. There is no reported case in which the question was fairly and fully discussed. 5. The pleadings in an action have no connection with the provisional remedies authorized to be had in it. It is neither necessary nor proper that facts, bearing merely upon the right to such remedies, should appear upon the record. So it has been decided with regard to an order of arrest (*Corwin a. Freeland*, 6 *N. Y.*, 560; *Sellar a. Sage*, 13 *How. Pr.*, 230; *Field a. Morse*, 8 *Ib.*, 47; *Cheney a. Garbutt*, 5 *Ib.*, 467); and so with regard to an injunction (*Putnam a. Putnam*, 2 *Code R.*, 64). 6. The old writ of injunction is abolished by the Code (§ 218), and of course all the rules pertaining thereto fall with it. None of the old rules as to the former writ are necessarily applicable to the Code-created order of injunction. They are to be revived only so far as, in the nature of things, they are just and suitable. Section 469 of the Code does not save them, inasmuch as there never was any practice existing before the Code concerning an order of injunction.

VIII. If the old rule of chancery should be applied at all under the Code, it certainly ought not to extend to an answer containing only general denials. No such form of pleading was tolerated in equity, and on such denials it is quite certain that no injunction would ever have been dissolved before the Code. (*Story Eq. Pl.*, § 852; *Mitf. Ch. Pl.*, 309; *Tipping a. Clarke*, 2 *Hare*, 389; *Woods a. Morrell*, 1 *Johns. Ch.*, 103; *Goodrich a. Pendleton*, 3 *Ib.*, 384; *Wharton a. Wharton*, 1 *Sim. & Stu.*, 235; *Mountford a. Taylor*, 6 *Ves.*, 792; *Pettit a. Candler*, 3 *Wend.*, 618; *Miles a. Miles*, 7 *Foster*, 447; *Hepburn a. Durand*, 1 *Bro. C. C.*, 503.) If for no other reason, the obvious fact that a general denial may be intended to apply to the averments of the complaint conjunctively, should be enough to destroy all the force of such a pleading. For it is

well settled that conjunctive denials, or negatives pregnant, are bad. (Shearman *a. N. Y. Cent. Mills*, 1 *Abbotts' Pr.*, 191; Hopkins *a. Everett*, 3 *Code R.*, 150; Tipping *a. Clarke*, 2 *Hare*, 390.)

IX. The true rule, under the Code, would seem to be that all provisional remedies should be placed on the same footing. And, in analogy to the practice on orders of arrest, where the right to the provisional remedy is intimately connected with the right of action, the burden of proof should lie upon the defendant. (Frost *a. McCarger*, 14 *How. Pr.*, 131; Republic of Mexico *a. De Arangoiz*, 5 *Duer*, 634; Anon., 6 *Abbotts' Pr.*, 320, *n.*; Bedell *a. Sturta*, *Ib.*, 319, *n.*; Chittenden *a. Hubbel*, *Ib.*)

F. H. B. Bryan and *S. B. Logan*, opposed.—I. The party seeking an injunction must show the court in what way, and how he was injured. (City of New York *a. Mapes*, 6 *Johns. Ch.*, 46; New York Printing Establishment *a. Fitch*, 1 *Paige*, 97; Osborn *a. Taylor*, 5 *Ib.*, 515; Hovey *a. McCrea*, 4 *How. Pr.*, 31.) The complaint in the present case simply shows an agreement not to occupy the premises for business, or within a block of them. It shows no consideration. It simply avers a breach of the promise, and does not show how the plaintiff has been or could be injured.

II. The covenant, that neither party shall continue business, without specifying what business, appears vague from its generality, and is without any consideration to sustain it, unless such may be derived from the copartnership itself.

III. The affidavits show that the plaintiff consented that the defendant should remain on the premises, and conduct the business.

IV. The whole equity of this bill is denied in the affidavits and answers, and in such cases the injunction cannot be granted. (Hoffman *a. Livingston*, 1 *Johns. Ch.*, 211; Roberts *a. Anderson*, 2 *Ib.*, 202; Couch *a. The Ulster Turnpike Co.*, 4 *Ib.*, 26; 1 *Barb. Ch.*, 641; 6 *How. Pr.*, 341.)

V. The burden of proof lies upon the moving party, and the defendant's affidavit being contradicted only by the plaintiff's, must be taken as true. [HILTON, J.—The burden of proof lies upon him to prove the facts which he alleges. But you admit those facts, and allege a new agreement. The burden of prov-

Norton *a.* Cary.

ing that rests, therefore, upon you.] We submit that our averment is corroborated by the circumstances.

HILTON, J.—By the articles of copartnership between the parties, it was expressly agreed that upon a dissolution neither should continue the business in the building used by the firm, or at any place within one block thereof, for the space of six months thereafter, without the consent of the other.

To avoid the enforcement of this plain stipulation, the defendant claims that there was an understanding had at the time of the dissolution, by which he was to be permitted to continue the business at the place the firm had occupied. But this claim cannot avail him upon this motion, as the affidavit of the plaintiff denies any such understanding, as fully and positively as it is asserted.

The defendant must, therefore, be considered as having failed to establish the existence of the understanding referred to, and the stipulation being thus left in full force, it follows that the plaintiff is entitled to have the defendant restrained from violating it.

Motion to continue injunction until the further order of the court, granted. \$10 costs of motion, to abide event of suit.

NORTON *a.* CARY.

Supreme Court, Fourth District; Special Term, August, 1862.

FORM OF SUMMONS.—DEPARTURE OF COMPLAINT.—AMENDMENT.

The summons in the form prescribed by subdivision 1 of section 129 of the Code, is proper only where the action is upon contract, for the recovery of a sum of money as such, without calling upon the court to ascertain or adjudge any thing but the existence and terms of the contract by which it is due.

In an action to recover both liquidated and unliquidated damages for breaches of contract, the summons should follow the second subdivision.

On a motion to set aside a complaint for departing from the summons in respect to the demand, the court should allow the plaintiff to amend the summons on terms, and to retain the complaint.

Motion to set aside the complaint.

This action was brought by C. F. Norton against Cary & Salisbury. The facts relied upon, as causes of action, are stated in the opinion.

A. B. Durant, for the motion.

H. S. Johnson, opposed.

BOOKES, J.—Motion to set aside the complaint, on the ground of variance or departure from the summons.

The summons is framed under subdivision 1 of section 129 of the Code, which must be followed by a complaint in an action arising on contract for the recovery of money only.

The complaint contains two counts, or separate causes of action—both founded on contract. The first charges an indebtedness of \$292.22 against the defendants for lumber sold by them as plaintiff's agents or consignees; the second sets up a contract between the parties, by which, as is alleged, the defendants agreed to receive lumber from the plaintiff on consignment, and to dock, store, insure, and sell the same, and make advances to the plaintiff thereon; and it is charged, that although the plaintiff performed the agreement on his part, yet the defendants refused to receive the lumber, or in any way to perform on their part, whereby the plaintiff was damaged two thousand dollars.

As regards the last count, the complaint is not in conformity with the summons, if we regard the decisions in *Cobb v. Dunkin* (19 *How. Pr.*, 164), and in *Tuttle v. Smith* (6 *Abbotts' Pr.*, 329; S. C., 14 *How. Pr.*, 395), as binding. Those are general-term decisions, in the latter of which we have an elaborate and very satisfactory opinion by Mr. Justice Einott. For myself, I am entirely satisfied to adopt his reasoning and conclusion. (See, also, 14 *How. Pr.*, 454.) It must now be deemed settled on authority, that in an action on contract, where the damages sought to be recovered are unliquidated or are incapable of being reduced to certainty by mere calculation from the elements which the agreement contains, the summons should be framed under subdivision 2 of section 129.

It is said that this construction will prevent a joinder of

Norton v. Cary.

causes of action as authorized by section 167. But this result does not follow. The plaintiff may unite in the same complaint several causes of action, when they all arise out of contract, express or implied; but if under either count unliquidated damages are sought to be recovered, the summons in the action should be framed under subdivision 2 of section 129. The summons will issue, pursuant to subdivision 1, in case the action be on contract, and be exclusively or only for the recovery of a definite sum or definite sums of money as such, and without calling upon the court to ascertain or adjudge any thing but the existence and terms of the contract by which it is due. "In other actions," the summons will issue, pursuant to subdivision 2; among which "other actions" will fall those on contract wherein the plaintiff unites in the same complaint several causes of action, some of which are by the contract for a fixed and definite sum, and others for unliquidated damages. Thus construed, sections 129 and 167 are in entire harmony. If the action be on a promissory note or money-bond, or on both, or on several promissory notes or on several money-bonds, the summons should issue pursuant to subdivision 1. If on a promissory note or money-bond, and, also, by separate count to recover unliquidated damages for breach of contract, it should issue pursuant to subdivision 2; for in the latter case, the action being for a fixed sum, and also for unliquidated damages, is not embraced in the class designated in subdivision 1, which, according to the decisions cited, applies only and exclusively to actions on contract for the recovery of a sum made certain by the contract or contracts counted on.

In this case the plaintiff has united in his complaint two causes of action, both arising out of contract: one of which is for the recovery of a sum made definite by the terms of the alleged agreement; the other, for unliquidated damages. The action is for these two causes; and inasmuch as unliquidated damages are sought to be recovered, it is an action other than those specified in subdivision 1, as construed and limited by the decision in *Tuttle v. Smith*. There is no misjoinder of causes of action. The plaintiff was authorized by section 167 to unite them in the same complaint, inasmuch as each is a cause of action arising out of contract, but in such case, one being for the recovery of liquidated, and the other for unliquidated damages,

Norton *v.* Cary.

the summons should have been framed under subdivision 2. It is suggested that both causes of action arise out of the same transaction. It does not so appear from the complaint, and the pleading must control in this regard. But, suppose they do so arise, or suppose the complaint was in a narrative form, stating the facts in detail, and showing a claim or indebtedness for \$292.22 for lumber sold, and also, a large claim for damages, under the same contract, for not receiving, docking, storing, or insuring lumber, still the action would be for unliquidated damages, in whole or in part, in which case the summons should issue under subdivision 2. In any view, it must be held that the complaint is not in conformity to the summons. If the plaintiff desire to retain his complaint in its present form, he must amend his summons. This would be pretty much a matter of course on proper application for that purpose. Indeed, I think, I ought to allow it now, as an alternative on this motion. I will, therefore, direct that the complaint be made to conform to the summons, by striking therefrom the second cause of action therein stated, and that the complaint stand so corrected or amended, without the service of any other or amended complaint, unless the plaintiff, within ten days after the entry of this order, serve on the defendant's attorney, Mr. Allen, a new summons containing a notice, as required by subdivision 2 of section 129, in which case the complaint already served is to stand as the complaint herein.

The question of practice raised by this motion is new. It is different on the facts, although similar in principle to that decided in *Tuttle v. Smith*, and in *Cobb v. Dunkin*. Indeed there is yet a diversity of opinion in regard to it. Judge Welles dissented in the last case cited, which, I believe, is the last reported case in which the question is considered. I am not aware that it has been up at all in this district. No costs of motion should consequently be allowed, unless the plaintiff elect to serve a new summons, in which case he must pay \$7 for the privilege.

KELSEY *v.* CAMPBELL.

Supreme Ct., Second District; General Term, September, 1862.

APPEAL TO COURT OF APPEALS.—PRIOR APPEAL.

If the sureties proposed in an undertaking given on an appeal to the Court of Appeals, fail to justify when excepted to by the respondent, the appeal becomes a nullity.

It is no bar to an appeal to the Court of Appeals, that a prior ineffectual appeal has been undertaken by the appellant.

Appeal from a judgment.

This action was brought by Charles Kelsey against Anthony F. Campbell, sheriff of Kings county, to recover the sum of \$687.69, with interest, the amount of an execution issued upon a judgment rendered by the Supreme Court, at a general term, in the second judicial district, in favor of plaintiff against Ward, Gove & Morris, on July 29, 1861. The debtors had served a notice of appeal from that judgment to the Court of Appeals, on July 29, 1861, together with an undertaking to stay proceedings. On August 1, 1861, the plaintiff excepted to the sufficiency of the sureties proposed: the sureties failed to justify, and on September 2, 1861, the plaintiff issued an execution upon his judgment to the defendant in the present action, as sheriff. On September 18, 1862, Ward, Gove & Morris served a new notice of appeal, with an undertaking to stay proceedings, which plaintiff declined to receive, and returned.

The sheriff having failed to collect the judgment or return the execution, the plaintiff brought the present action in November, 1861. The sheriff relied upon the appeal of September 18th, as a defence. The cause was tried before Mr. Justice Lott, who ordered judgment for the defendant. The plaintiff appealed.

Britton & Ely, for the appellant.—The proceedings of the sheriff were not stayed by the second appeal. 1. An appeal

Kelsey *a.* Campbell.

was made under § 275 of the Code; rendered effectual under § 334, and the respondent excepted; and under § 341, the appeal is to be regarded as though no undertaking was given. The fair construction of the whole subject is: the appeal is taken by serving the notice, and in certain specified cases before the appellant shall derive any benefit from his appeal, he shall comply with certain other conditions. Unless this be the true construction, then a judgment-debtor may, by the successive service of notices of appeal, and undertakings with insufficient sureties, obtain a stay of proceedings on a judgment for two years without security, besides creating inextricable confusion, and a probable approval of some of his undertakings by default. 2. An appeal having been made and then pending, the subsequent service of a notice and undertaking was a nullity. Until dismissed, no second appeal will lie. The appeal was dismissed in *Dresser a. Brooks* (4 *How. Pr.*, 207). 3. But if we are wrong in this, and the appeal must be "perfected," in the language of the Code, before there is any appeal pending, the first appeal was so "perfected," although, by his own laches or bad faith, and an order of this court, his appeal failed to accomplish the purpose intended. There is a distinction between "perfecting the appeal," and doing all things necessary to stay proceedings. (*Thompson a. Blanchard*, 4 *How. Pr.*, 210; *Code*, § 327, last clause.)

Philip S. Crooke, for the respondent.—The first appeal being abandoned, the last is operative as a stay of proceedings. (*Langley a. Warner*, 1 *N. Y.*, 606, 607.)

BY THE COURT.*—BROWN, J.—On the 26th of July, 1861, the plaintiff recovered a judgment in this court against Robert M. Ward, Walter S. Gove, and Edward P. Morris, for the sum of \$687.69, which was docketed in Kings county clerk's office on the same day. On the second day of September of the same year, he issued an execution against the property of Ward, Gove & Morris, with directions to collect the whole amount of the judgment with interest, which execution was placed in the hands of the defendant in this action, the sheriff of Kings

* Present, BROWN, EMOIT, and LOTT, JJ.

Kelsey a. Campbell.

county, to be executed, returnable on the first day of November thereafter. The defendants in the execution had goods and chattels within the county of the defendant, whereof he could have made the sum directed to be collected upon the execution. But he omitted to do so, and neglected to return the same at the return-day thereof. Whereupon, the plaintiff brought this action against the sheriff, and demanded judgment against him for the sum of \$687.69, with the interest. The action was tried before Mr. Justice Lott, at the Kings county circuit, where the foregoing facts were not disputed. It appeared on the part of the defendant, that a notice of appeal, with undertaking, affidavit, and certificates of acknowledgment, were filed in the office of the clerk of the county of Kings, dated the 29th of July, 1861, the day they were filed; and copies thereof were on the next day duly served on the attorneys for the plaintiff. Notice of exceptions to the sureties upon the undertaking was, on the first day of August, duly served by the plaintiff's attorneys upon the attorney for the defendants in the judgment. The sureties failed to justify, and, on the 14th of September thereafter, notice was given to the sheriff that the undertaking was not perfected, and the court afterwards denied a motion made by the defendants for leave to the sureties to justify, a copy of which order denying the motion was, on the 20th of the same month, served upon the sheriff. Notice was also given to the sheriff that the sureties having failed to justify, he was required to proceed to the execution of the writ. On the 18th of September, a new notice of appeal, undertaking, affidavits of justification, and certificate of acknowledgment, were filed in the office of the clerk of Kings county, copies of all which papers, with a certificate of such clerk that the same were true copies of the original, were on the same day served upon the defendant, and the plaintiff also had due notice thereof. No exception was taken to the sureties in the last-named undertaking, nor was the last-mentioned appeal vacated or set aside. But on the next day thereafter, the plaintiff returned to the attorney for the judgment-debtor the copy of the last-named undertaking served upon him, with notice that he refused to receive the same. These facts constituted the defence. The Circuit Judge, sitting without a jury, found that the last-mentioned appeal and proceedings operated as a stay of pro-

ceedings under the execution, and were a justification and defence to the sheriff for not collecting the money upon the execution. He ordered judgment for the defendant, from which the plaintiff appealed to the general term.

The plaintiff contends that there can be but one appeal, which is taken by the service of the notice of appeal. If the appellant omits to file the undertaking, or the sureties thereon fail to justify, the appeal becomes ineffectual to stay the proceedings; but for all other purposes, and especially for the purpose of preventing a new appeal which shall become effectual, the first appeal remains in full force. He takes a distinction between an appeal generally, and an appeal which shall effect the only object and end for which an appeal is taken, that is, to remove the action into the appellate court and be reheard and determined. The plaintiff's theory will be sufficiently stated by reference to the facts of the present case. The defendant served his notice of appeal regularly and in due season. But the sureties omitted to justify and prove their ability to indemnify the plaintiff within the time limited by the Code, and the court refused them leave to do so after the time had elapsed. The plaintiff contends that the defendant cannot discontinue or renew his appeal with sureties who will justify in due season, and that the first appeal remains a bar and a barrier to all future action of the kind. This theory is not borne out by the provisions of the Code. If, in addition to the appeal, it be intended to stay the execution of the judgment, the undertaking must be of the nature and kind provided for in § 335; but if it be a mere appeal, leaving the respondent to proceed to the execution of the judgment, the stipulation of the undertaking must be of another kind, as directed in § 334. But this latter section declares in very emphatic language, that to render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant, with at least two sureties to the effect, &c.; or the sum mentioned in the section must be deposited with the clerk. An undertaking upon an appeal shall be of no effect, unless accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein. If excepted to, they are to justify within ten days, or the appeal shall be regarded as if no undertaking had been given (§ 341).

The People *on rel.* Ward *a.* Kelsey.

An appeal without an undertaking amounts to nothing, and accomplishes nothing. For the section requiring an undertaking declares, that without it the appeal shall not be effectual for any purpose. An appeal which is not effectual for any purpose is a nullity. It effects nothing. It makes no change whatever in the proceedings, but leaves them in the same condition as they were before the notice of appeal was given. This is too plain for argument. So that when the sureties in the undertaking of the 29th of July, 1861, failed to justify, and the court, upon motion, refused them permission to justify, the notice of appeal of that date, with all the proceedings connected therewith, fell to the ground, and the parties were remitted to the same condition they were in before the notice was given.

The defendants were thus left free to effect and perfect a new appeal, with an undertaking which stayed the execution of the judgment. This, it is not disputed, has been done. In *Langley v. Warner* (1 *N. Y.*, 606), the defendant, Warner, had given notice of an appeal, but with a defective undertaking. An application was made for leave to amend the undertaking, which the Court of Appeals denied, saying that "if the appellant really desires the judgment of this court, he can bring a new appeal."

The judgment should be affirmed.

THE PEOPLE *on rel.* WARD *a.* KELSEY.

Supreme Court, Second District; General Term, Sept., 1862.

WHARF.—LANDLORD AND TENANT.—RENT.—SUMMARY PROCEEDINGS.—TRIAL BY JURY.

A wharf or pier, reclaimed from tide-water by embankment or by raising the bottom with stone, earth, or other material, is a tenement within the meaning of 2 Rev. Stat., 512, which authorizes summary proceedings in favor of a landlord to recover the possession of houses, lands, or tenements.

An agreement to construct a wharf, to be occupied when finished, by the grantee,

The People *on rel.* Ward *a.* Kelsey.

at a stipulated rent, accompanied by words of present demise, operates as a lease.

When the State makes a grant of land, covered with the waters of a bay or navigable river, and the grantee reclaims and raises it above the surface of the water, he is invested with all the rights that pertain to the ownership of land. Whenever the relation of landlord and tenant is made out in summary proceedings to recover the possession of demised premises, the tenant is estopped from disputing the title of his landlord.

In summary proceedings to recover possession of demised premises, it is not competent for the tenant to show a breach of the landlord's agreement to construct the premises in a proper manner. The tenant cannot withhold both the rent and the possession.

Wherever trial by jury is authorized, the presiding magistrate has power to charge the jury upon the law of the cause.

Certiorari to the city judge of Brooklyn.

The writ was issued on the petition of Robert M. Ward, Walter S. Gove, and Edward P. Morris, for the purpose of reviewing certain summary proceedings to recover the possession of a wharf, which were instituted by Charles Kelsey, as landlord, against Ward, Gove & Morris, as tenants. Kelsey had rented to Ward & Gove certain storehouses and a pier at the foot of Sedgwick-street, Brooklyn, together with his right, title, and interest in the water in front thereof. A year afterwards he agreed in writing to build in a certain manner, and let to Ward, Gove & Morris a structure alongside the pier, to be called "an addition to the pier," and they agreed to hire the same from him at \$1,700 per annum. Ward, Gove & Morris entered into possession of this addition, January 1, 1860, and continued to occupy it until January, 1862, when, no rent having been paid, summary proceedings were instituted, because of non-payment of the rent for the year 1861, before Hon. George G. Reynolds, city judge of Brooklyn, which, after a trial by jury, resulted in a warrant under which the tenants were dispossessed.

The tenants now brought up the proceedings for review by certiorari.

The objections raised appear sufficiently in the opinion of the court.

Skeffington Sanxay, for the relator.—I. The premises are not shown by the proceedings to be houses, lands, or tenements;

an addition to a pier, which had been hired and occupied by two of the parties, is neither.

II. It does not appear that the addition is in the city of Brooklyn, or county of Kings. The premises are clearly in the county of New York. (1 *Rev. Stat.*, 2.)

III. It does not appear that the conventional relation of landlord and tenant existed. (4 *Den.*, 185; 5 *N. Y.*, 383; 5 *Wend.*, 281; 9 *Ib.*, 227.)

IV. A wharf is a mere franchise. (*Wiswall a. Hall*, 3 *Paige*, 313; 2 *Den.*, 625.)

V. The city judge had no right to charge the jury. The statutes relating to summary proceedings are in derogation of the common law, and must be strictly construed.

Britton & Ely, for the respondent.—I. A wharf or pier extending into a navigable stream may be the subject of the relation of landlord and tenant, and of summary proceedings. A pier is both land and a tenement. It rests upon and is built into the soil. Whether built of wood, on piles, or of stone, it is just as much land as though raised above the surface of the water, by deposit of earth. It is *per se* land and nothing else. (*Co. Litt.*, 4 *a*; 3 *Kent Com.*, 402; 2 *Blackstone Com.*, 16, 17.) Nor is it any answer to this view that the rights acquired by the use of the pier amount only to a franchise. Trespass could be maintained for an injury to the pier, which cannot be for an injury to an incorporeal right. (*Wilson a. Smith*, 10 *Wend.*, 324; *Child a. Chappell*, 9 *N. Y.*, 251, 252.) A bridge is not a franchise, although the right to erect it and take toll may be. The relators are estopped from disputing Kelsey's title: for the purposes of this proceeding he is the owner in fee. (*Ingraham a. Baldwin*, 9 *N. Y.*, 45; *Jackson a. Whedon*, 1 *E. D. Smith*, 141.) The act of 1836, ch. 484, empowering Kelsey to erect the pier, conferred upon him a qualified interest quite sufficient to enable him to sustain this proceeding.

II. That the pier was not built in the manner and of the materials agreed upon, was immaterial in this proceeding. The pier being finished and the relators having taken possession, the relation of landlord and tenant commenced, and the facts alleged in the affidavit of the landlord, and controverted by the tenants, as allowed by the statute, were all which could be tried

The People on rel. Ward *a.* Kelsey.

in this proceeding. (Duigan *a.* Hogan, 1 *Bosw.*, 646 ; S. C., 16 *How. Pr.*, 164 ; La Farge *a.* Mansfield, 31 *Barb.*, 345.)

BY THE COURT.*—BROWN, J. — On the 27th of September, 1858, Robert M. Ward and Walter S. Gove, two of the relators, by a lease of that date, became the tenants of the defendant, Charles Kelsey, of certain storehouses and a pier at the foot of Sedgwick-street, in the city of Brooklyn, together with all Kelsey's right and title to the water in front thereof. The term was for ten years from the first of February, 1859, at an annual rent of \$10,000. They entered into possession of the demised premises, and have so remained in possession since the commencement of the term. On the 9th day of June, 1859, Kelsey, by another agreement in writing, made with Robert M. Ward, Walter S. Gove, and Edward P. Morris, the relators in this proceeding, bearing date on that day, by which he agreed to build an addition of 30 feet in width to the pier, beginning with said addition 40 feet out from the bulkhead and extending out to the outer end of the pier. He was to complete the same before the 1st of January thereafter.

Ward, Gove & Morris agreed to pay to Kelsey the sum of \$1700 per annum as rental for such addition, from the time of the completion of such addition to the end and termination of the lease before mentioned, to Robert M. Ward and Walter S. Gove. The agreement then proceeds in the following words: "Said Kelsey agrees to let, and by these presents does let, unto said Ward, Gove & Morris, the said addition to the pier (in consideration of the rental above stipulated), from the time of its completion to the end and termination of the lease of the present pier. And said Kelsey agrees to build a good and substantial addition to the pier, as regards strength and good material."

The construction of the pier, the entry of Ward, Gove & Morris upon the demised premises, and their occupation by them, the rent in arrear, and the holding over, without the permission of Charles Kelsey, after demand and default in the payment of the rent, are facts found affirmatively by the jury, as appears by the return of the city judge of Brooklyn to the

* Present, EMOTT, P. J., BROWN, SCRUGHAM, and LOTT, JJ.

The People on rel. Ward v. Kelsey.

writ of certiorari, and are to be taken as true for all the purposes of this examination and decision.

The first objection taken to the regularity of the proceedings before the city judge of Brooklyn is, that he acquired no jurisdiction to act in the matter, because the statute in respect to summary proceedings to recover possession of lands relate to the tenants of any houses, lands, or tenements, and that a pier erected in a navigable river is not within the meaning of either of these terms. Hereditament would have been a more comprehensive term.

But few persons, I think, would entertain any doubt that a pier of ground reclaimed from tide-water by embankment, or by raising the bottom by filling with stone, or earth, or other material, in the manner in which piers and wharves are constructed above the surface of the water, would be regarded as land. Where the reclamation is permanent and durable, what is it, if it is not land? Be that as it may, the word tenement signifies every thing which may be holden, if it be of a permanent nature, and a wharf or pier is so permanent that it becomes a part of the soil and freehold itself.

It is also objected, that the written instrument of the 9th of June, 1859, is not a lease, and did not create between Kelsey and Ward, Gove & Morris the relation of landlord and tenants. We are to look at the intention of the parties. The instrument is not an agreement for a lease to be executed at a future time. It contemplated no new instrument. The premises demised were to be fitted for the use of the tenants, and in part created; for the pier was to be created and raised above the waters of the river or bay, so as it might be fit for human occupation. But when completed, the instrument took effect as a lease. The words used are words of present demise—"Kelsey agrees to let and by these presents does let unto said Ward, Gove & Morris the said addition to the pier," reserving rent. As soon as Ward, Gove & Morris entered upon the pier and took it into their possession, the relation of landlord and tenant commenced, and existed at the time the summary proceedings were instituted. The agreement was not a grant of the right to take wharfage, which is an incorporeal right, but it was a lease of corporeal property for a term of years, carrying with it the right of occupation and enjoyment.

The counsel for the relators argues that a wharf is a mere franchise to collect wharfage. It belongs to the public at large, for commercial purposes, and there is no element of property in it but the franchise to collect wharfage. This certainly is novel doctrine. The people of the State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all the lands within the jurisdiction of the State: lands above as well as below tide-water; and may, through the legislative power, grant to private uses the one as well as the other. The State makes a grant of lands covered with the waters of a bay or navigable river, and the grantee reclaims and raises it above the surface of the water. Why shall he not be invested with all the rights that pertain to the ownership of lands.

The title of Charles Kelsey to the pier cannot, however, become the subject of inquiry here. Whenever the relation of landlord and tenant is made out in summary proceedings, to recover the possession of the demised premises, certainly the tenant is estopped from disputing the title of his landlord. (*Jackson a. Smith*, 7 *Cow.*, 717; *Jackson a. Spear*, 7 *Wend.*, 401; *Ingraham a. Baldwin*, 9 *N. Y.*, 45.)

The counsel for the relators, upon the hearing, offered to show that the addition to the pier was not built by the defendant in a good and substantial manner, equal in any respect to the old pier, as regards strength and good material.

This evidence was objected to by the counsel for the landlord, and the objection sustained by the judge—the relators excepted to the decision. The failure to construct the pier in conformity with the stipulation of the agreement, might have constituted a good defence to an action upon the lease to recover the rent. But it is no defence or answer to the claim of the landlord to have the possession restored to him. One of the questions of fact submitted to and affirmed by the jury is, that the tenants took possession of the demised premises under the lease. They thus became vested with the term. They cannot now refuse to pay the rent, and at the same time retain the possession and enjoyment of the premises against the claim of the landlord. They have their election, to pay the rent, or restore the possession when demanded. They cannot withhold from him both the rent and the possession. (*Lafarge a. Mans-*

The People *on rel.* Ward *a.* Kelsey.

field, 31 *Barb.*, 345 ; Duigan *a.* Hogan, 1 *Bosw.*, 646 ; S. C., 16 *How. Pr.*, 164.)

When the evidence was closed, and the questions involved were about to be submitted to the jury, the judge proceeded to charge them upon the law of the case. Whereupon, the counsel for the tenants objected, that there was no legal right vested in the magistrate in summary proceedings to charge the jury. Several questions of law arose in the progress of the trial, with which it cannot be supposed the jury were conversant, and which it was of some consequence should be rightly comprehended, before they could act intelligibly and sensibly.

The defendant insists that they were not to obtain a knowledge of the law from the judge, and that whatever he said in respect thereto, however just and true, was an error, for which this court should reverse the proceedings.

This is a most extraordinary proposition. There is no express authority and direction contained in the statute concerning summary proceedings to recover the possession of lands (2 *Rev. Stat.*, 417), that the judge shall instruct the jury upon the law. Nor are there any express words authorizing him to swear the witnesses, or to say what is to be received as evidence and what not ; nor even to preserve order and decorum during the trial. Yet no one would think of disputing his authority to do all these things. Without it, the trial could not proceed, and the remedies provided by the act could not be obtained. All these powers, as well as that to instruct the jury, are to be implied. Where the facts upon which the summons was issued are denied by an affidavit, the matters controverted are to be tried by the magistrate or by a jury, provided either party at the proper time demand a jury (§ 34). The matters controverted are those facts upon which the summons was issued and denied by the affidavit of the person in possession of the premises. The legal questions are still, however, to be determined, as all such issues are certainly determined by the judge holding the court or conducting the proceedings. There is to be a trial by a jury. Trial is the examination of the matter of fact in issue. "Trial by jury, called also trial *per pais*, or by the country, a trial which hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof." (3 *Black. Com.*, 349.)

Wait *a.* Ferguson.

This commentator then proceeds to describe how the jury are to be summoned and selected, how the testimony is to be received and the witnesses examined, &c., and says, "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury, omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and gives them his opinion in matters of law arising upon that evidence."

When our statutes speak of trial by jury, they mean a trial conducted in the manner described by the English commentator. Jurists and lawyers have no conception of a well-conducted trial by jury, in which the charge of the judge upon the law of the case is omitted.

Numerous other questions were raised upon the hearing, which I decline to consider.

The proceedings should be affirmed with costs.

WAIT *a.* FERGUSON.

New York Common Pleas; Special Term, May, 1862.

CORPORATION.—STATUTE LIABILITY OF STOCKHOLDERS.—CONSTRUCTION OF STATUTE.—COUNTER-CLAIM.

It is a good defence to an action by a creditor of a corporation, to recover the amount of his debt from a stockholder under a statute provision making stockholders jointly and severally liable in case of a deficiency in the cash capital, that such creditor himself, at the time of acquiring his demand against the corporation, was a stockholder therein.

Under a statute provision that the officer of a corporation making a false certificate shall be liable for all the debts of the corporation contracted while he is an officer or stockholder, such liability extends to debts contracted by the corporation in favor of the officer during that period.

That facts constituting a defence, not a cause of action, are averred in an answer as a set-off or counter-claim, is not a ground of demurrer.

Demurrer to an answer.

This action was brought by William S. Wait against John Ferguson, to recover \$12,011.85. The plaintiff had recovered a judgment for this amount in the Madison Circuit Court, a court of general law and equity jurisdiction in the State of Illinois, against the Mississippi and Atlantic Railroad Company, for services as an officer of the company. A writ of *fieri facias* had been issued upon the judgment, and returned unsatisfied. The Mississippi and Atlantic Railroad Company was incorporated under the general railroad act of the State of Illinois, passed November 5, 1849. The act was set forth at length in the complaint in the present action. One of its provisions was as follows: "All the stockholders of any such company that shall be hereafter incorporated under this act shall be severally individually liable to the creditors of such company, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by the company in manner aforesaid shall have been paid in, and a certificate thereof shall have been made and recorded, as prescribed in the following section, and shall be jointly and severally liable for all debts that may be due and owing to all their laborers, servants, and apprentices, for services performed for such corporation, but not be liable to an action therefor before an execution shall be returned unsatisfied, in whole or in part, against the corporation, and then the amount due on said execution shall be the amount recoverable, with costs, against said stockholders."

The complaint further averred that the defendant had subscribed stock to the extent of \$12,500, and had not paid any portion of it. The answer, among other defences, contained the following:

"Fourth, and for a further and separate defence in this action, the defendant, upon information and belief, says, that from the time of the alleged organization of the railroad company in the complaint herein mentioned to the time of which the alleged causes of action accrued, and during the whole of the period of the alleged rendering of services by the plaintiff to said company, the plaintiff was, and he still is, a holder of the stock of said company, within the true intent and meaning of the 14th section of the general railroad act of the

Wait v. Ferguson.

State of Illinois, in the complaint in this action partially set forth.

"Fifth, and for a further and separate defence in this action, the defendant says, that in the general railroad law of the State of Illinois, in the complaint herein mentioned, and in part set forth, it is enacted as follows, viz.: '§ 17. If any certificate or report made or public notice given by the officers of any such company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers of the company who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.' And upon information and belief, he further says, that the affidavit mentioned and described in paragraph four of said complaint was a certificate made in pursuance of the provisions of said act, and was false in certain of the material representations thereof, to wit, in representing that the sum of \$16,000 had been actually paid in, as required by law, when no actual and *bona-fide* payment thereof to the directors named in the articles of association in said complaint mentioned had been made. That said affidavit of certificate was signed by William S. Wait, the plaintiff herein, as one of the directors of said alleged company. And that thereupon the plaintiff became, and he now is, liable for all of the debts of the said company contracted while he was a stockholder or officer thereof, and especially for the alleged debt for the recovery of which this action is brought.

"Sixth, and for a further and separate defence in this action, and for a set-off and counter-claim therein, the defendant, upon information and belief, states that the plaintiff, on or about the 7th day of August, 1850, subscribed for, and ever since has been and now is the holder of, forty shares of the capital stock of the said Mississippi and Atlantic Railroad Company, of the par value of \$2,000, and that he has never paid the amount of his said subscription, and is indebted therefor to the said company in the said sum of \$2,000."

To these defences the plaintiff demurred.

John L. Jernegan, in support of the demurrer.—I. The fourth defence presents the question, whether a stockholder, who is also a creditor, can sustain this action against another stock-

holder. Our complaint sets forth, that by a special act of the Illinois Legislature the Mississippi and Atlantic Railroad Co. was declared a valid corporation. 1. This case is therefore distinguishable from *Bailey v. Bancker* (3 *Hill*, 188). 2. The case of *Simonson v. Spencer* (15 *Wend.*, 548) is an authority expressly in point. 3. The objection that defendant on recovery by plaintiff and satisfaction might turn round and recover back, is answered: Stockholders liable only to the extent of their stock: defendant held \$12,500; plaintiff, \$2,000: this defence is not a good plea to the whole action, and is bad on demurrer. (*Woodruff Iron Works v. Chittenden*, 4 *Bosw.*, 406.) That plaintiff being a stockholder cannot maintain the action, is untenable. (*Ib.*) To constitute this a defence, there must be a present liability of the plaintiff to the defendant: a future contingent liability is not sufficient. The stockholders are made liable only "for the debts and contracts made by the company." It is difficult to see how this language can be made applicable to debts which did not arise until after its existence was terminated.

II. The fifth defence is based on a statute highly penal, which should not be extended by construction to cases not fairly within its language. (*Garrison v. Howe*, 17 *N. Y.*, 458.) It is simply absurd to say that the plaintiff is liable to pay himself the debt due from the company. The State of Illinois was the party injured by the alleged misrepresentation in the affidavit: it has pardoned it, and annulled its consequences by the statute referred to above. (*People v. Manhattan Co.*, 9 *Wend.*, 351.)

III. The counter-claim. This is not a demand existing in favor of a defendant against a plaintiff under Code, § 150; nor is it a demand which the plaintiff was entitled to recover at the commencement of the suit. (*Van Valen v. Lapham*, 5 *Duer*, 689.)

John Day Ferguson, opposed.—I. As to the fourth defence, the allegation that plaintiff being a stockholder is not a "creditor" within the intent, &c., in itself constitutes a defence good on demurrer. 1. The law of Illinois is matter of evidence, and hence the allegation is not a conclusion of law. (1 *Greenleaf on Evidence*, 10 ed., § 488; *Thompson v. Ketcham*, 8 *Johns.*,

189.) 2. But allowing that the laws of Illinois and of New York are identical, plaintiff, being a stockholder, is not such a "creditor" as is intended by the law. Stockholders in such companies stand as to each other in the relation of partners. (Allen *v.* Sewall, 2 *Wend.*, 327; Harger *v.* McCullough, 2 *Den.*, 119; Corning *v.* McCullough, 1 *N. Y.*, 47, 60; *Coll. on Part.*, 3 Am. ed., § 1078, and cases cited.) Neither ordinary partners nor members of joint-stock or incorporated companies are liable in such an action to their copartners. (*Coll. on Part.*, §§ 264, 289, 1116, and cases cited; Englis *v.* Furniss, 4 *E. D. Smith*, 587.) Stockholders in companies incorporated under our acts are not so liable. (Bailey *v.* Bancker, 3 *Hill*, 188; adopted in Andrews *v.* Murray, 33 *Barb.*, 354, and frequently quoted; overruling Simonson *v.* Spencer, 15 *Wend.*, 548.) The partnership relation *inter se* is not destroyed by the provisions of the statute making the stockholders *severally* liable to third persons, and limiting the amount of their liability, for they are partners, not by virtue of the statute, but independent of it. (Corning *v.* McCullough, 1 *N. Y.*, 47, 58.) They are jointly interested in the capital and profits of the company. They are mutually liable in an action for a final accounting. (Slee *v.* Bloom, 19 *Johns.*, 456.) 3. Even though it be held that plaintiff is a creditor "within," &c., the answer is good on demurrer. The liability at common law is unlimited; and if plaintiff desire to avail himself of a statutory limitation or exemption, it is for him to set it up, and bring himself within it. (1 *Van Santv. Pl.*, 524; Wies *v.* Fanning, 9 *How. Pr.*, 543.) 4. Plaintiff does not ask an accounting, and his complaint does not state facts sufficient to entitle him to that relief.

II. As to the fifth defence. 1. The facts stated constitute a good defence. The principles and authorities as to partnership liabilities above cited are here fully applicable to the liability of the plaintiff, being unlimited. The plaintiff's liability arises *ex delicto*, in which case there is no right of contribution. (1 *Parsons on Contracts*, 37; Andrews *v.* Murray, 33 *Barb.*, 354.) 2. The defence intended to be made is sufficiently stated.

III. As to demurrer to sixth defence. 1. The matter alleged constitutes a good defence to the action. 2. It is sufficiently stated, and is not invalidated by being called a counter-claim as well as a defence. The pleading will be liberally, and not

Wait *a. Ferguson*.

technically construed. (*Code*, § 159.) The plaintiff is in no way damaged or delayed thereby. Matter stated as a counterclaim has been allowed to stand as a defence. (*Davis a. Acker*, 11 *How. Pr.*, 163; *Wolf a. E. H.*, 13 *Ib.*, 85.)

HILTON, J.—The fourth defence is, in substance, that from the time of the organization of the railroad company referred to in the complaint, under the general railroad law of the State of Illinois, the plaintiff was, and still is, a stockholder and member thereof, and therefore not a creditor within the meaning and intent of the 14th section of that law, which declares that all such stockholders shall be severally individually liable to the creditors of such company, to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of the capital stock shall have been paid in, and a certificate thereof shall have been made, filed, and recorded, as therein prescribed.

Every combination of persons for the purpose of carrying on business of any kind for mutual profit may be denominated a partnership, and each member thereof is jointly and severally liable for all obligations which may be incurred in the prosecution of the business thus entered upon. Thus, an incorporated company is a species of partnership, but its shareholders are not liable in their individual capacity, unless it is so expressly declared in the act of incorporation; this exemption being one of the principal objects for which the incorporation is procured, and, it should be assumed, is only granted in those cases where the undertaking is of an important nature, embracing public as well as private interests and benefits.

In the present case, it seems the Legislature of the State of Illinois, by their general railroad law, did not intend to exempt companies from this individual liability incident to all partnerships, until all the capital stock had been paid in, and a certificate to that effect had been filed and recorded; but when it was filed, and the entire capital had become devoted to the objects specified in the articles of association, then the company thus formed became a full-fledged corporation, possessed of all the immunities and privileges incident to such statutory creations.

Here it appears the company never arrived at this state of

Walt a. Ferguson.

perfection, the capital stock never having been paid in, and hence the stockholders never acquired this exemption from personal liability incident to the perfect corporate existence contemplated by the general statute under which the company was organized. They should, therefore, in my opinion, be regarded as *quasi* partners—at least as between themselves—and subject, upon prosecuting each other, to all the provisions of law attaching to that relation; one of those rules being that one member of a partnership cannot maintain an action against his copartners for a debt due from all. (*Story on Part.*, §§ 220, 221.) And, although in one aspect this statute differs from the common-law rule respecting partners, in giving an action against stockholders severally, yet, as was said by Judge Bronson, in *Bailey a. Banker* (3 *Hill*, 188), I do not perceive that this alters the principle. It is still the case of one partner suing another for a debt due from the whole partnership. (*Moss a. Oakley*, 2 *Hill*, 265; *Allen a. Sewall*, 2 *Wend.*, 327; *Story on Part.*, §§ 76, 77; *Andrews a. Murray*, 33 *Barb.*, 354; *Collyer on Part.*, §§ 10, 81, 3 *Am. ed.*; *Harger a. McCullough*, 2 *Den.*, 119; *Pierce a. Kearney*, 5 *Hill*, 82; *Marquand a. Webb*, 16 *Johns*, 89.) The case of *Woodruff & Beach Iron Works a. Chittenden* (4 *Bosw.*, 406) proceeds upon the authority of *Simonson a. Spencer* (15 *Wend.*, 548), which I regard as virtually overruled, certainly widely departed from, in *Bailey a. Banker* and *Moss a. Oakley*, *supra*. (See, also, *Mann a. Pentz*, 3 *N. Y.*, 415; *Englis a. Furniss*, 4 *E. D. Smith*, 587, 599; *Andrews a. Callendar*, 13 *Pick.*, 484.)

For these reasons, I think the fourth defence set up in the answer a valid one, and the demurrer to it should be overruled.

The fifth defence pleaded by the answer, and which is likewise demurred to, is in substance, that by the same General Railroad Law of the State of Illinois it is declared that every officer of a railroad company who signs a certificate, report, or public notice given in pursuance of the provisions of that act, which contains any material false representation, shall be liable for all the debts of the company contracted while he is a stockholder or officer thereof. The defendant then alleges that the plaintiff, being one of the directors of such company, made and swore to an affidavit or certificate which was attached to the articles of association required by the general law, to be made

Wait *a. Ferguson*.

and verified at the time of the formation of any company under it, wherein it was falsely stated that \$16,000 had been actually paid in, being ten per cent. upon the capital of the proposed company. That at the time of making such affidavit no actual and *bona-fide* payment had been made to the directors mentioned in the articles, and therefore the plaintiff becomes liable for all the debts contracted while he was a stockholder, and especially for the indebtedness sued upon in this action.

It cannot, I think, be denied that this affidavit was made in pursuance of the requirements of the general law, and that it contained a material false representation. It was in effect a false certificate as to a fact which was required to be established by oath as a condition precedent to the persons signing the articles of association becoming in any sense a corporation, and as a punishment for this false representation, the law imposed upon the officer in making it, a liability for all the debts of the company contracted while he was a stockholder or officer, and which would include the claim or indebtedness in suit.

I admit that this is a highly penal provision, and should not be extended by construction to any cases not fairly within its language. (Garrison *a. Howe*, 17 *N. Y.*, 458.) Yet I think this case is clearly one within its plain intent and import. It is not material to whom the debt shall become owing; it is sufficient if the company contracts it while the officer making the false representation continues to be a stockholder or officer. For all such debts he is liable. To hold that this penal provision had no application to debts contracted by the company with the officer who should thus violate the law, would certainly be an extraordinary interpretation of plain and positive language, and would be in effect awarding a premium for criminality.

Assuming, then, that the plaintiff has in this manner become liable for the payment of this debt, in whosoever hands it may be, it would follow that permitting a recovery by the plaintiff would subrogate the defendant to his rights as a creditor, and thus we would have them suing each other indefinitely for the same debt. (See *Bailey a. Bancker*, and *Andrews a. Murray*, *supra*.) There is nothing in the law which would sanction a recovery leading to a litigation so endless and fruitless.

The demurrer to the fifth defence is not, in my judgment, well taken, for the reasons stated.

Morris a. Walsh.

The remaining demurrer is to the sixth defence, which is interposed as such, and also "as a set-off or counter-claim." It alleges that the plaintiff, at the time this debt was contracted, was, and still is, the owner of forty shares of the capital stock of the company, of the par value of \$2,000, and for which he subscribed; that no part of such subscription had been paid by him, and that he was, and still is, indebted therefor to the company.

Assuming the views I have already expressed are correct, it follows that some of the facts stated in this defence are proper to be interposed in bar of any recovery in an action of this nature between two stockholders or *quasi* partners. There is, however, a technical objection to the entire defence being stated as a counter-claim or set-off, but it may be amended in that respect. (*Code*, § 150.) It is not a demand existing in favor of the defendant against the plaintiff for which a recovery can be had, but the defence, as stated, contains matter in bar of the plaintiff's right of action, although it might be more properly pleaded in connection with the averments contained in the fourth defence. It may be that the fact respecting the non-payment of this subscription is immaterial, and that the only substantive fact is the statement as to the number of shares which the plaintiff holds. But the demurrer being to the whole of the defence set up, I cannot say that it is altogether bad. If the plaintiff desires to strike out any part of it as immaterial or irrelevant, his remedy is by motion for that purpose.

Judgment for the defendant on the demurrers, with costs.

MORRIS a. WALSH.

New York Superior Court; General Term, October, 1862.

IMPRISONED DEBTOR.—DURESS.—CONTEMPT.—SECOND COMMIT-
MENT.—RES ADJUDICATA.

An imprisoned debtor is equally subject to be sued and prosecuted to judgment, and to be proceeded against, in all the modes prescribed by law to enforce civil remedies, as if he were at large.

Morris *v.* Walsh.

It is no excuse for refusing to execute a conveyance directed by a judgment of court, that there is no person present to become subscribing witness or commissioner to take the grantor's acknowledgment, or that there is no seal attached to the instrument.

A judgment directed the defendant to execute a conveyance upon the written demand of the plaintiff; the plaintiff served a copy of the judgment with a written demand, and two months afterwards presented to the defendant a proper conveyance, and required its execution.

Held, that defendant's objection that the written demand was not served at the time of requiring the conveyance was untenable.

The fact that a plaintiff has not done enough at the time of procuring defendant's conviction of a contempt in disobeying a portion of the decree, to procure his conviction for a disobedience of another portion, does not disable plaintiff from doing such other acts as are necessary to put the defendant in contempt in that respect.

Appeal from an order directing a commitment for contempt.

This action was brought by Peter Morris against Thomas J. Walsh, to cancel a building contract. The plaintiff obtained judgment; the contract was adjudged cancelled, and defendant required to execute a release and conveyance of the premises, and to deliver up the keys of the houses. Failing to do so after personal service of a copy of the judgment, an order to show cause was issued, why an attachment should not issue. The defendant opposed the application upon several grounds; among others, that a certified copy of the judgment should have been personally served with the order to show cause, and that no demand had been made by the plaintiff, who, before judgment, had been appointed receiver for the delivery of the property. The objections were overruled, and the defendant adjudged guilty of a contempt, and committed to jail. Subsequently, while defendant was in jail, a second commitment was granted against the defendant, who had declined to execute a release under circumstances sufficiently set forth in the opinion. From the order for the second commitment the defendant appealed.

A. Hamilton Reavy, for the appellant.—I. The tender to the defendant of a release to execute, and the demand relied on, were made of the defendant while he was in prison, in custody under the first proceeding. There were no witnesses present to sign the paper, and no commissioner to receive the

Morris a. Walsh.

defendant's acknowledgment of the instrument; the instrument tendered to him to sign was defective for want of a seal. It was therefore no deed; besides, the defendant ought to have had the opportunity of submitting the papers to his counsel for examination. He was deprived of this by his incarceration and his inability to communicate with him. This right to consult counsel in criminal cases is carefully guarded in this State by statute as well as by judicial decisions. (2 *Rev. Stat.*, 708, 4 ed., § 14; *People v. Restell*, 3 *Hill*, 289.)

II. The judgment of the court required that the demand to be made of the defendant for the execution of the release and for the delivery of the possession of the premises should be in writing. No such written demand was ever made.

III. Two commitments have been issued to the sheriff in this case. The second commitment is irregular, and should be set aside for the reason that what occurred on the issue of the first attachment was the same matter, and was therefore *res adjudicata*.

Daniel M. Porter, for the respondent.—The fact that he was already in jail under a commitment for a previous contempt in disobeying another and separate requirement of the same judgment does not invalidate his commitment for this contempt. Whether he executed the release or not did not affect his previous commitment, and to allow that to invalidate this commitment would be to allow the defendant to take advantage of his own wrong. Any authority which makes void acts done under duress will be distinguishable from this, inasmuch as the act here required did not require him to do any thing for which he was then imprisoned, but an entirely different business from the contempt for which he was detained; while, in order to make duress, the act required must relate to his imprisonment and be procured from him in order to obtain his discharge from his then imprisonment. If the defendant had executed the release mentioned in the second order, it would not have in any manner affected his imprisonment on the first, therefore there was no duress.

Morris *a.* Walsh.

BY THE COURT.*—BOSWORTH, Ch. J.—It is sufficient, in answer to the first objection taken by the appellant, to say, that the fact that the defendant was in prison when the written release was presented to him to be executed, did not absolve him from the duty imposed by the judgment, nor affect the plaintiff's power or right to use the usual remedies to enforce the judgment. An imprisoned debtor, especially when imprisoned by virtue of proceedings against him in a civil suit, is equally subject to be sued and prosecuted to judgment, and to be proceeded against in all the modes prescribed by law to enforce civil remedies, as if he were at large. That no persons were present to witness the execution of the release, or take his acknowledgment of it, did not make it any the less his duty to execute it. If the release was not sealed when presented to him, *non constat* that it would not have been, had he not refused to sign it, or to impress his own seal upon it as part of the act of executing it. It does not appear that he expressed a wish to consult his counsel, or suggested that it was of any consequence that he should do so; nor is any objection now made that the release was not in proper form.

As to the second objection, it appears by the papers that a copy of the judgment was *served on the defendant personally* on the 11th of June, 1862, and a written demand was also then served, requiring him to execute forthwith a release in such form as shall be approved by one of the justices of the court. On the 5th of August, 1862, such a release was presented to him for execution, and he refused to sign it. The only objection that can be made to this part of the proceedings is, that the demand in writing was made nearly two months before the release was presented. We do not see any ground for complaint that the written demand had been served before the release was presented, instead of being served at the same time.

To the third objection it is enough to say, that the fact the plaintiff had not done enough, at the time of defendant's conviction of a contempt in not surrendering possession of the premises, to procure his conviction for refusing to execute a release, did not disable the plaintiff from subsequently doing such

* Present, BOSWORTH, Ch. J., BARBOUR, ROBERTSON, MONELL, WHITE, and MONCRIEF, JJ.

Jones *a.* Decker.

further acts as would warrant the conviction of the defendant, on being proceeded against after the further acts had been done, or exempt the defendant from liability to be convicted on proof thereof in the manner prescribed by law. None of the objections made to the order appealed from being tenable, it should be affirmed. Ordered accordingly.

JONES *a.* DECKER.

Supreme Court, Second District; General Term, May, 1861.

APPEAL TO SUPREME COURT FROM INFERIOR COURT.—CITY COURT
OF BROOKLYN.—SECURITY FOR COSTS.

An appeal under section 344 of the Code to the Supreme Court from an inferior court, is ineffectual unless security for costs be given as on an appeal to the Court of Appeals.

So held, in the case of an appeal from an order of the City Court of Brooklyn overruling a demurrer.

Motion to dismiss an appeal.

This action was brought in the City Court of Brooklyn by James J. Jones against Susan A. and Reuben H. Decker. The defendants separately demurred to the complaint. Judgment was rendered for the plaintiff on the demurrers, with leave for the defendants to answer, on payment of costs. The defendants took the present appeal from this decision as from an order, but gave no security for costs. The plaintiff, after waiting twenty days, entered judgment for \$176.86, damages and costs. The defendants noticed their appeal for argument at the general term, whereupon the plaintiff made the present motion to dismiss the appeal.

Provost & Fisher, for the motion.

Brainerd & Rice, opposed.

Jones *a.* Decker.

BY THE COURT.*—EMOTT, J.—This appeal from an order of the City Court of Brooklyn, if it be well taken, is subject to the latter clause of section 6 of the City Court Act, which enacts that all provisions of law relative to appeals from courts of inferior jurisdiction to the Supreme Court, shall apply to appeals from said City Court.

Section 344 of the Code declares in what cases appeals will lie to this court from an inferior court, and section 345 provides that security must be given upon such appeal, that is, upon every appeal to this court from an inferior court, in the same manner and to the same extent as upon an appeal to the Court of Appeals. At the time of the passage of the act of 1850, amending the City Court Act, there was no appeal allowed from an order of an inferior court to the Supreme Court, and the defendants' counsel contends that therefore the provisions contained in the Code as to appeals to the Court of Appeals do not apply to appeals from orders. That conclusion does not follow, however. The 334th section of the Code declares that to render an appeal to the Court of Appeals effectual for any purpose, there must be a written undertaking in the sum of \$250 to pay all costs and damages, or that amount must be deposited with the clerk with whom the judgment or order was entered. This section comprehends and provides for appeals from orders as well as from judgments; and it is applicable to every case in which an appeal is given to this court from an inferior court, whether it be from an order or from a judgment. It does not alter the case that no appeal is or was given by the Code from orders of inferior courts, for in 1860 an appeal was authorized from orders of County Courts. (*Laws of 1860, 787, ch. 459.*) The appeal is given by the City Court Act. The manner of perfecting it is prescribed by the Code, and that is by giving the same security which is requisite on an appeal to the Court of Appeals, where an undertaking is requisite as well on an appeal from an order as from a judgment. As no security was given on this appeal, the motion to dismiss is granted, with \$10 costs.

* Present, LOTT, EMOTT, and BROWN, JJ.

LYON *v.* SHERMAN.

Supreme Court, First District; At Chambers, May, 1862.

JUDGMENT ON CONFESSION.—SUFFICIENCY OF STATEMENT.

An averment in a statement for judgment on confession, that the indebtedness arose for money loaned and advanced by the plaintiff to the defendant at a time mentioned, including interest thereon to date, is a sufficient statement of the facts out of which the indebtedness arose.

Motion to vacate three judgments entered on confession.

On the 22d of November, 1861, three judgments were entered in the Supreme Court against Austin Sherman on confession. The first judgment was in favor of Ephraim Lyon, for \$3,471.42. The confession, after setting forth the usual formal averments, was: "The said sum of \$3,471.42 is the balance due the said plaintiff of various sums of money lent and advanced by him to the said defendant during the last three years, and includes interest upon such loans and advances to this date."

The second judgment was in favor of Harriet Tuttle, for \$1,560.55. The facts were alleged as follows: "The said sum of \$1,560.55 is the balance now due from said defendant to said plaintiff upon a loan of \$1,700 which was made by said plaintiff to the said defendant about twenty-two months ago, and includes interest to this date."

The third judgment was in favor of William D. Ludlow, for \$3,410.12. The facts were set out as follows: "The said plaintiff has from time to time during the last eighteen months lent and advanced various sums of money to this defendant at his request, the amount of which loans, with interest to this date, is \$3,410.12, above mentioned."

This motion was made by Joseph F. Daly, a judgment-creditor of Sherman for \$429.23, upon copies of these judgments and an affidavit setting forth various facts having a tendency to

Brown *a.* Hermann.

show collusion between these judgment-creditors and the defendant.

S. W. & R. B. Roosevelt, for the motion.

Charles W. Sandford, opposed.

BARNARD, J.—According to the cases of *Clafin a. Sanger* (11 *Abbotts' Pr.*, 338; *S. C. at Chambers*, 31 *Barb.*, 36), *Moody a. Townsend* (3 *Abbotts' Pr.*, 375), and *Davis a. Morris* (21 *Barb.*, 152), all decided by the Supreme Court of this district, the confessions of judgment in these actions are insufficient. But, I think, the cases of *Freligh a. Brink** (22 *N. Y.*, 418), and *Lanning a. Carpenter* (20 *Ib.*, 447), have overruled the above cases in this district.

The principle in the above two cited cases in the Court of Appeals will sustain the judgments in these actions.

Motion denied, with \$10 costs.

BROWN *a.* HERMANN.

Supreme Court, First District; Special Term, June, 1862.

LIABILITY OF MARRIED WOMEN ON COVENANTS.

A married woman, by accepting a deed of land subject to mortgage, and covenanting to pay the mortgage, does not bind herself or any of her separate property other than the land so conveyed, unless such deed and covenant are made in the course of a trade or business carried on by her.

Motion for judgment.

In this action, which was brought by the executors of Robert J. Brown, deceased, against Isaac Hermann and others, for a deficiency arising upon the foreclosure of a mortgage, it appear-

* The case of *Freligh a. Brink*, 22 *N. Y.*, 418, reverses *S. C.*, 30 *Barb.*, 144, and 16 *How. Pr.*, 272; and affirms *S. C.*, 18 *How. Pr.*, 89.

ed that Anna D. Anthony, one of the defendants, was the owner of the equity of redemption, and had acquired it by a deed which declared that she assumed the payment of the mortgage. At the time of such conveyance to her she was a married woman, and so remained up to this time.

There was no allegation in the case, that she had purchased the property for the purposes of any business carried on by her.

The plaintiff moved for a personal judgment against her, as well as the other defendants, for the deficiency.

Livingston K. Miller, for the motion, cited *Yale a. Dederer* (22 *N. Y.*, 450), *Young a. Gori* (13 *Abbotts' Pr.*, 13, *note*), *Laws of 1860*, 157, § 7, and the amendments to the Code of 1862.

W. Grigg, for Mrs. Anthony, opposed.—I. It is not alleged, and does not appear, that Mrs. Anthony intended to or did charge her estate for the debt. This is essential. (*Yale a. Dederer*, 18 *N. Y.*, 265; *Arnold a. Ringold*, 16 *How. Pr.*, 158.)

II. The covenant relied upon did not create a present debt, but only a contingent liability, which cannot be charged against Mrs. A.'s estate, without express words to that effect. (*Yale a. Dederer*, 18 *N. Y.*, 265; *Curtis a. Engel*, 2 *Sandf. Ch.*, 287; *Phillips a. Hagadon*, 12 *How. Pr.*, 17.)

III. The covenant is not binding, unless it is shown to be for the benefit of Mrs. A. or her estate, even though it were charged upon the same.

BARNARD, J.—No statute has gone to the extent of enabling a married woman to enter into any contract she pleases, and render herself liable on such contract. I apprehend that if a married woman purchase an article of dress, or an ornament, or a horse, or articles of furniture, for use of herself or her family, and not for the purpose of carrying on a separate business, she is not now liable any more than she was at common law.

The plaintiff cites the case of *Young a. Gori* (13 *Abbotts' Pr.*, 13, *note*); but neither that case, nor the case of *Barton a. Beer* (35 *Barb.*, 78; *S. C.*, 21 *How. Pr.*, 309), go to this extent.

As *Young a. Gori* was decided by me, it is proper I should point out the distinction between that case and this one. *Young*

Brown *v.* Hermann.

a. Gori, so far as it discusses the liability of the married woman, goes to no further extent than to hold that the act of 1860, by authorizing a married woman to carry on any trade or business, and enacting that the earnings of such trade or business shall be her sole and separate property, and by also enacting that no bargain or contract entered into by any married woman in and about the carrying on of any trade or business shall be binding on her husband, or render him or his property in any way liable therefor, had necessarily the effect of authorizing the woman to purchase goods as her separate property for said business, and of making goods so purchased for trade, and the trade itself (so far as it can be called property), the separate property of the woman; and that in such case an action to recover the purchase-money of goods bought to carry on such business was an action having relation to her separate property, not from the mere fact that it was an action for the purchase-money of goods bought by her, but because the goods purchased, for the price of which the suit was brought, went into the business or trade, the profits of which the statute gives her as her sole and separate property.

In *Yale v. Dederer* (22 *N. Y.*, 450, 461), the Judge delivering the opinion of the court, says:

"These provisions show that the Legislature has not even now intended to remove the common-law disability of married women to bind themselves by their contracts at large. To be obligatory on them or their estates, under our latest statutes, their contracts must relate entirely to their separate property, or to the particular trade or business in which they are engaged."

The other point held in *Young v. Gori* is, that in an action brought against a married woman, having relation to her separate property, she may be sued the same as if she were a man. And it is supposed that this gives countenance to the plaintiff's case. It must surely be obvious that if it appears on the trial that the action has no relation to her separate property, it must fail; and it cannot be argued that because it is held that in a case where a married woman is liable to be sued as a feme sole, she can be sued precisely as if she were a man; that therefore it is held that the bringing of a suit against her in such manner makes binding a contract which otherwise would be of no force. It must be first established that the action is brought in relation

to the separate property of the married woman, and that the contract sued on is one which the law of the State would render binding on her in the same manner as if she were sole; the result then follows, as held in *Young v. Gori*, that she may in such case be sued as if she were a man.

For the reasons above expressed, the amendments of 1862 to the Code do not help the plaintiff.

Plaintiff invokes the doctrine that in equity a married woman may charge her separate estate, and cites *Yale v. Dederer* (22 *N. Y.*, 450).

The judge delivering the opinion of the court in that case says, on page 460: "No debt can be charged which is not connected by agreement, either express or implied, with the estate. If contracted for the benefit of the estate itself, it would of course become a lien, upon the well-founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgages for purchase-money." So far as this is concerned, the plaintiff here gets the full benefit of the doctrine by a simple judgment of foreclosure and sale, directing the proceeds to be paid in satisfaction of his mortgage so far as they will extend. But the judge proceeds: "No other kind of debt can, it seems to me, be thus charged without some affirmative act of the wife evincing that intention." In the case before me I am unable to discover any act of the wife evincing an intention to charge any separate property of hers other than that covered by the mortgage.

The whole of the reasoning of the case is against the plaintiff's view.

This case of *Yale v. Dederer* does not, therefore, in my view, sustain the plaintiff.

The motion, so far as it asks for judgment for deficiency against Mrs. Anthony, must be denied.

The rest of the motion is granted.

*Cataline
of 918.
3. 345
5 March 1864.*

FREEMAN v. FULTON FIRE INSURANCE COMPANY.

Supreme Court, Second District; General Term, Sept., 1862.

PLEADING.—REQUISITES OF COMPLAINT UPON AN INSURANCE POLICY.

Every thing which was necessary to sustain a plaintiff's case at common law, unless made unnecessary by statute, must be alleged in his complaint.

Wager policies of fire insurance are void at common law, irrespective of any statute.

In an action upon a fire insurance policy for the amount of the loss, the complaint must allege that the plaintiff had an interest in the thing insured at the time of the loss; unless the claim was assigned to him afterwards, or unless he sues as trustee of an express trust.

If the plaintiff sues as trustee or agent, he must allege in his complaint the existence of such trust, and show his authority to collect the amount of the insurance.

A complaint in such an action, which alleges an insurance effected by the plaintiff with the defendant, but shows no interest in the thing insured existing in the plaintiff at the time of the loss, and no authority conferred upon him by the owner, except to pay the premium, is bad on demurrer.

Appeal from an order at special term, overruling a demurrer to the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action.

The action was upon a policy of insurance against loss by fire, issued by the defendants, April 26, 1861, upon the steamer "Cataline."

The complaint stated: "That at the time of the issuing of the policy, Charles A. Stetson, Jr., was the owner of the 'Cataline.' That in consideration of the payment by the plaintiffs, who thereto were employed by and therein acted as agents of the said Stetson, to the defendants, of the premium of six dollars and eighty-eight cents, the defendants made and issued their policy and delivered it to the plaintiffs, for the account of whom it might concern; by which the defendants insured the plaintiffs, or whom it might concern, against loss or damage by fire to the amount of \$2,500, on the steamer 'Cataline,'

&c., while running, &c., from the 26th day of April, 1861, until the 26th day of July, 1861, with privilege of effecting other insurance to the amount of \$17,500, without notice until required; and in and by said policy agreed to pay the loss, if any, to the plaintiffs, under their firm-name of 'M. M. Freeman & Co.;' and that said Charles A. Stetson, Jr., was, at the time of the issue of said policy, and up to the time of the fire continued to be, the person or party for whom said insurance was effected and whom it concerned."

The complaint further stated, "That at the time of the insurance, and from thence until the fire, Stetson had an interest in said insured property, to an amount exceeding the whole amount of insurances (\$20,000), and was the owner of the property, the cash value whereof was \$24,000. That on the 2d day of July, 1861, the vessel was burned, &c. That Stetson and the plaintiffs had fulfilled all the conditions and requisitions of the policy on their part to be performed; that the plaintiffs had demanded payment of the defendants of said \$2,500, which the defendants refused to pay."

John Owen and Thomas G. Shearman, for the appellant.—

I. All actions are now to be brought in the name of the real party in interest (*Code*, § 111), with an exception in favor of trustees of an express trust, &c. (*Ib.*, § 113.) The plaintiffs do not claim as trustees for Stetson, but in their own right. The rules of equity in relation to parties are adopted by the Code (*Corning v. Greene*, 23 *Barb.*, 44; *Brownson v. Gifford*, 8 *How. Pr.*, 395; *Hollenbeck v. Van Valkenburgh*, 5 *Ib.*, 284; *Secor v. Keller*, 4 *Duer*, 419), and in equity a mere nominal party was not allowed to sue. (*Rogers v. Traders' Ins. Co.*, 6 *Paige*, 598; *Field v. Maghee*, 5 *Ib.*, 539.)

II. It is absolutely essential, in order to recover upon a policy, that the person insured should have an interest in the property at the time of the loss. The contract is one of indemnity; and if the insured is not damnified, he cannot recover. (*Murdock v. Chenango County Mutual Ins. Co.*, 2 *N. Y.*, 216; *Howard v. Albany Ins. Co.*, 3 *Den.*, 301; *Shotwell v. Jefferson Ins. Co.*, 5 *Bosw.*, 261; *Grosvenor v. Atlantic Ins. Co.*, 17 *N. Y.*, 392; *Kernochan v. Bowery Ins. Co.*, *Ib.*, 442.)

III. It was necessary, even at common law, and entirely

irrespective of any statute, that the person insured should have an interest in the property, in all cases of fire insurance. (*Lynch v. Dalzell*, 3 *Bro. P. C.*, 497; *Sadler's Co. v. Badcock*, 2 *Atk.*, 554. See *Ruse v. Mutual Benefit Ins. Co.*, 23 *N. Y.*, 523.) A distinction was taken between fire and marine policies, which accounts for some cases which are loosely cited as holding an averment of interest unnecessary. All these cases, without a solitary exception, will, on examination, be found to arise upon marine or life policies. And they have all been overruled by the Court of Appeals, which has just decided that wager policies of every description are void at common law, on grounds of public policy. (*Ruse v. Mutual Benefit Ins. Co.*, 23 *N. Y.*, 516.)

IV. The importance of the fact that an insurance without interest was void at common law becomes manifest in this case. 1. It is an undoubted rule that the plaintiff must allege every thing in his complaint, which at common law or in equity it is necessary for him to prove at the trial. (*Prindle v. Caruthers*, 15 *N. Y.*, 427; *Bank of U. S. v. Smith*, 11 *Wheat.*, 174; *Safford v. Drew*, 3 *Duer*, 632; *McMillan v. Saratoga R. R. Co.*, 20 *Barb.*, 455; *McKyring v. Bull*, 16 *N. Y.*, 297.) The cases which hold it unnecessary to allege that a contract was made in writing, &c., proceed upon the ground that acts valid at common law, but regulated by statute, may be pleaded in like manner as before the enactment of the statute. (*Stephen on Pleading*, 373; *Hilliard v. Austin*, 17 *Barb.*, 141; *Dewey v. Hoag*, 15 *Ib.*, 368; *Stern v. Drinker*, 2 *E. D. Smith*, 406.) 2. The Court of Appeals has explicitly declared, that in all actions upon insurance policies, the plaintiff must "aver and prove the interest of the plaintiff. It is an indispensable part of the plaintiff's case, to be made out affirmatively at the trial." (23 *N. Y.*, 527.) 3. The plaintiff is therefore bound to allege in his complaint that he had an interest in the thing insured. (*Ruse v. Mutual Benefit Ins. Co.*, 23 *N. Y.*, 527; *Williams v. Ins. Co. of North America*, 9 *How. Pr.*, 365; *Peabody v. Washington County Mutual Ins. Co.*, 20 *Barb.*, 339; *Cousins v. Nantes*, 3 *Taunt.*, 513.)

V. The reason of the rule that a wager policy is void, as stated in several places, is, that it is deemed unsafe to permit any one to have a direct pecuniary advantage to gain by the

commission of arson. If this reason is sufficient to prevent A. from recovering on an insurance made for his benefit without interest, why does it not apply with equal force to prevent him from recovering on a policy made by him for account of B., the real owner, with loss payable, not to B., nor to A. for the benefit of B., but to A. in his own right, and for his own benefit? The authorities are uniform and explicit that an assignment of the policy, in order to be of any benefit to the assignee, must be accompanied with a transfer of some kind of interest in the subject of insurance. (*Ellis on Ins.*, 69; *Marshall on Ins.*, 800; *Phillips on Ins.*, § 77; 3 *Kent's Com.*, 395; *Hooper v. Hudson River Fire Ins. Co.*, 17 *N. Y.*, 424; *Peabody v. Washington County Mutual Ins. Co.*, 20 *Barb.*, 339, 341.) In like manner, ROOSEVELT, J., in *Kernochan v. N. Y. Bowery Fire Ins. Co.* (17 *N. Y.*, 442), declares it to be a "principle of public policy, that no man should be allowed to bargain for an advantage to arise from the destruction of life or property."

VI. The assignee or appointee must, under the principles stated in the preceding points, have, and aver in his complaint, an interest in himself in the thing insured. There are cases decided under the old practice which tend to show that at common law, the person named in the contract might sue, without having any interest, for the benefit of the real party in interest. These cases have no doubt misled the plaintiffs. A different rule is established by the Code, and an action not only may, but must, be brought by, and in the name of, the real party in interest. (§ 111.) And even before the Code, it was held in the Court of Errors that "it must appear" in an action upon a policy made "for whom it may concern," that "the policy was made in behalf of the persons who claim to recover." (*Pacific Ins. Co. v. Catlett*, 4 *Wend.*, 79.) All the cases of fire insurance policies since the Code, in which an appointee in like manner with the plaintiffs has been allowed to recover, have been cases in which the appointee was expressly described as mortgagee, thus showing a power coupled with an interest.

VII. It will be argued that the defendants, by issuing the policy to the plaintiff, admitted their interest in the subject of insurance. The answer is twofold: 1. The doctrine has no foundation in reason, and it has been expressly overruled by the Court of Appeals. (*Ruse v. Mutual Benefit Life Ins. Co.*,

23 *N. Y.*, 527.) 2. If there were any thing in the point, the plaintiffs have expressly negatived all presumption of interest in them by their complaint, in which they set up Stetson's exclusive interest.

VIII. The case of *Fowler a. N. Y. Indemnity Ins. Co.* (23 *Barb.*, 143), upon which the plaintiffs rely, does not aid them. 1. All it really decides is, that the word "his," prefixed to the description of the thing insured, is a sufficient averment of ownership in the plaintiff. 2. The remarks of Judge Strong, to the effect that an averment of interest is unnecessary, are not authority, nor can they be sustained on principle. He cites no authority for his suggestion, nor could he. The doctrine is expressly repudiated by the Court of Appeals. (23 *N. Y.*, 527.) He goes on to say, that "hence" it has been held that an averment of interest is unnecessary. For this proposition he cites three cases, one of them having been reversed on error (3 *Taunt.*, 513), though he did not know it, none of them based upon the argument to which he refers by the word "hence," and all of them being cases of marine insurance, which we have shown were governed by a distinct class of rules, and in which wager policies were assumed to be valid at common law.

IX. If the plaintiffs sue as agents for Stetson, the owner of the property insured, they ought to state the fact in their complaint. An agent sues as a trustee (*Code*, § 113; *Considerant a. Brisbane*, 22 *N. Y.*, 389), and stands on the same footing with executors, receivers, &c. He sues in the right of another. And, therefore, in order to conclude that other on the record, he must allege his agency, and seek relief in his representative capacity. Otherwise the suit must be taken to be his own. (See *Gould a. Glass*, 19 *Barb.*, 185; *Sheldon a. Hoy*, 11 *How. Pr.*, 14; *Ogdensburgh Bank a. Van Rensselaer*, 6 *Hill*, 241; *Henshall a. Roberts*, 5 *East*, 151.)

X. The complaint nowhere shows that the plaintiffs were agents for Stetson, except for the single purpose of procuring the insurance and paying the premium. They were, as they say, employed by Stetson, and acted as his agents, to pay the premium—nothing more; which, by any freedom of construction, cannot be held to imply an agency to do more than procure the insurance, which, by Story's definition (*Agency*, § 28), constituted them simply brokers. They had no power to effect

an insurance in their own name, much less to make the loss payable to themselves.

XI. It is not alleged that the loss was payable to them as agents of Stetson, or that they act as his agents in demanding the money, or in bringing this action. It is in this view that this case differs from *Considerant v. Brisbane* (22 *N. Y.*, 389). There the contract was expressly with the agent as such.

XII. To sustain this action, it is clearly necessary that the plaintiffs should allege that they are the agents of Stetson, and authorized to effect and recover this insurance in their own name, and that they, as such agents, are the parties whom it concerned, and that this action is for account of Stetson. (See *Myers v. Machado*, 6 *Abbotts' Pr.*, 198.)

Henry Nicoll, for the respondents.—I. By the terms of the policy, the defendants expressly undertake, in case of loss, to pay the same to the plaintiffs. At the common law this would be held to be a contract with the plaintiffs, upon which they would be entitled to bring an action in their own name, although the beneficial interest in the subject-matter of the contract might be in another. (*Harp v. Osgood*, 2 *Hill*, 216; *Sargent v. Morris*, 3 *Barn. & Ald.*, 277; *Ennis v. Harmony Fire Ins. Co.*, 3 *Bosw.*, 516; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 *N. Y.*, 391; *Considerant v. Brisbane*, 22 *Ib.*, 389.)

II. It is wholly immaterial to the plaintiffs' right of recovery, whether they have an interest or not in the property insured; it is sufficient if the parties for whose benefit, as owners, the policy was taken out, had such interest at the time of loss. This would be held to be so in the case of an assignment of a policy by the party insured to a third person; *a fortiori* must this be so where in the contract itself the defendants expressly undertake, in case of loss, to pay the same to another. Policies of insurance, taken out in the names of brokers, factors, or trustees, have always been held valid, and capable of being enforced by them, if the parties beneficially interested have sustained a loss. (*Angell on Fire Ins.*, 114, § 73; *Burke v. Chesapeake Ins. Co.*, 1 *Pet.*, 163; *De Forest v. Fulton Fire Ins. Co.*, 1 *Hall*, 84; *Fowler v. N. Y. Indemnity Ins. Co.*, 23 *Barb.*, 143; and cases before cited.)

III. In stating a cause of action upon a policy of insurance,

Freeman *a.* Fulton Fire Insurance Company.

no averment of an interest in the insured is necessary. But for the statute against wagers, a policy of insurance, without interest, would be a valid contract. It will not be presumed that a contract valid at common law is within the provisions of a prohibitory statute. (Fowler *a.* N. Y. Indemnity Ins. Co., 23 *Barb.*, 143; Dykers *a.* Townsend, *Ct. of Appeals*, Dec., 1861.)

IV. Independently of the question of interest, the plaintiffs, within the terms of sections 111 and 113 of the Code, are clearly trustees of an express trust, being persons with whom and in whose name the contract was made for the benefit of those who are interested in the loss as owners of the vessel, and, as such, are entitled to bring the action. (Considerant *a.* Brisbane, 22 *N. Y.*, 389; Grinnell *a.* Schmidt, 2 *Sandf.*, 705.)

BY THE COURT.—EMOTT, J.—If the case of Fowler *a.* N. Y. Indemnity Ins. Co. (23 *Barb.*, 143), decided that an averment of interest in the insured is unnecessary in declaring on a fire policy, it cannot be sustained. The cases to which Judge Strong refers to sustain his remark to that effect will be found, all of them, to be cases of marine insurance. In such cases, an averment of interest was unnecessary, for such policies were valid as wager policies, although the plaintiff had, in fact, no interest in the subject insured. Of course, therefore, neither an averment nor proof of interest could be required to sustain a recovery on such a policy. (Buchanan *a.* Ocean Ins. Co., 6 *Cow.*, 318.) If the doctrine stated by Judge Strong, in the case to which I refer, could be sustained, it could only be on the ground that no interest in the property insured was requisite to sustain a policy of insurance against fire, which certainly is not the case under the statute against wager policies, or else, because a policy of that description would be valid at common law, and is only defeated by the statute. This latter view was urged with ability by the plaintiff's counsel on the present argument. If it were true that wager policies of fire insurance, or policies of insurance against fire, where the insured had no interest in the property insured, would be valid were it not for the statute, there would be force in his argument, that no interest need be averred in the plaintiff in declaring on them. Where a contract is valid at common law, but is forbidden by a positive statute only, it may not be necessary for a plaintiff in declaring

upon it to negative an exception made by the statute, or to aver that it is not within its prohibition. It is unnecessary, however, to consider how far this is the rule of pleading, or how far the present case would be controlled by such a rule, since the premise upon which the whole argument rests—to wit, that a contract of insurance against fire would be valid at common law, although the insured had no interest in the premises—cannot be sustained. In *Ruse v. Mutual Benefit Life Ins. Co.* (23 *N. Y.*, 516), it was held by the Court of Appeals, that a policy of insurance upon the life of another, obtained by one who has no interest in the life, is void at common law. The same rule must apply to fire policies, and indeed, in the case I have just referred to, Judge Selden shows that such is the rule recognized by authority, and that the contrary statements in some cases, which have misled even judges, as well as text-writers and makers of digests (see, for instance, 3 *Abbotts' Dig.*, 414), are all made in reference to marine policies. The cases recognize an exception in the case of policies of marine insurance, although the reason for the exception is not apparent, and its extent is confined to this class of insurances. It must be considered well settled at present, that at the common law, as well as under the Statute of Betting and Gaming (1 *Rev. Stat.*, 662, § 8), a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured. It follows that a complaint in an action on the policy must contain an averment of such an interest, in order to state a cause of action.

The present complaint states no such interest in the plaintiffs, but it is further contended that the action may be supported by them upon the averment which it contains of the interest of Charles Stetson, under the provisions of sections 111 and 113 of the Code. In the case of *Considerant v. Brisbane* (22 *N. Y.*, 389), the Court of Appeals held that where a contract was made, containing a promise to pay A. B. as “executive agent” of C. D., A. B. might maintain an action upon the promise, although the consideration moved wholly from C. D., and A. B. had no interest in the contract. A person who is described, or who describes himself, as the agent of another, in making a contract for the benefit of such other person, and in which the latter alone is interested, according to the reasoning in the case

Freeman *a.* Fulton Fire Insurance Company.

of Considerant *a.* Brisbane, falls within that class of persons who, by the 113th section of the Code, shall be construed to be trustees of an express trust. He is a person with whom, or in whose name, a contract is made for the benefit of another. We are now to see whether this rule will include such a case as is stated by this complaint.

We have seen that the plaintiffs cannot maintain an action upon this policy of insurance, if made for their own benefit, for the want of interest in the subject-matter insured. It follows as a corollary from this conclusion, applied to the facts which appear in the complaint, that the only person by whom, or for whose benefit a valid policy of insurance upon this steamboat could have been effected, was Charles A. Stetson. The question, therefore, is, does this complaint show a valid contract, made with the plaintiffs, or in their name, for the benefit of Charles A. Stetson. The policy of insurance is alleged to have been delivered to the plaintiffs for the account of whom it may concern, and the defendants are stated by their contract, to have insured the plaintiffs, or whom it may concern. It is also averred that Charles A. Stetson was at the time of the issue of said policy, and up to the time of the fire continued to be, the person or party for whom said insurance was effected, and whom it concerned. It will be observed that the policy was not made to the plaintiffs for, or on behalf of, or as the agents or trustees for whom it might concern.

The contract is in the alternative—to insure either the plaintiff, or whom it might concern. Taking the other allegations that Charles A. Stetson was the person or party whom it concerned, it might follow that this was a contract with, or insurance of, Charles A. Stetson. Then the question would arise, whether Stetson himself could sue upon such a contract. But in so far as this policy or contract was with the plaintiffs, it is not stated, and does not appear, that they were or acted as the agents of Charles A. Stetson. The loss, if any, was made payable by the policy to the plaintiffs,—not as agents or trustees of Stetson, or whom it should concern,—but in their individual character. The premium was paid by the plaintiffs who are alleged thereto, that is in respect to such payment, to have been employed by, and therein to have acted as the agents of, the said Stetson. But there is no allegation that the plaintiffs made the contract

as agents of Stetson, or that the money was payable to them in that character. The allegation of agency is confined to the single act of paying the premium. Under the case of *Considerant v. Brisbane*, if the plaintiffs procured the insurance as the agents or for the benefit of Stetson, that fact should have been stated, and the further question would then have arisen, whether parol proof of such a trust or agency could be given, when it was not declared, or stated, in the written contract. But the present complaint is, in my opinion, defective for the want of any positive and issuable averment of such a trust or agency. It does not appear whether the insurance was made or is to be enforced for the benefit of the plaintiffs individually, or by them as trustees for Stetson. Assuming that the latter state of facts may be true, that it is not inconsistent with the facts stated, yet it does not positively appear to be the truth. Where the person with whom the contract was made, and who brings an action upon it, has no interest in the property which would authorize or enable him to make such a contract himself, he is bound to state affirmatively that he acted as the agent of another, whose interest was sufficient to sustain the contract. The allegations of this complaint leave it, to say the least, in uncertainty whether this contract was made by the plaintiffs for themselves or for the benefit of another. If it was made on their own account, they should have had and should have averred an insurable interest in themselves; if for Stetson, that should have been positively stated. They should have alleged that the policy was made to and with them for the benefit of Stetson, and as his agents or trustees.

I am of opinion that the present complaint is defective, that it does not state a cause of action, either in the plaintiffs individually, or as trustees of an express trust, and that the demurrer should have been allowed.

The judgment should therefore be reversed.

All the judges concurred in this opinion.

Judgment reversed, and demurrer allowed.

HARPER *v.* CHAMBERLAIN.*Supreme Court, First District; At Chambers, Sept., 1862.*

COSTS TO SEVERAL DEFENDANTS.

In an action against several defendants, not united in interest, and making separate defences by separate answers, on judgment for all the defendants, it is in the discretion of the court to restrict the defendants to one bill of costs, or to allow to certain of the defendants costs, according to the circumstances of the case.

Motion to restrict the defendants to one bill of costs.

This action was brought by James, John, Fletcher, and Joseph W. Harper, against Royal Chamberlain and twenty others.

The action was commenced in January, 1860, twelve only of the defendants were served with summons. The action was to recover from the defendants, as directors of the New York City Insurance Company, the sum of \$12,000 and upwards, being the amount of a judgment in favor of the plaintiffs against the company; the plaintiffs seeking to hold the defendants liable for such judgment, on the ground of fraudulent representations, and by reason of their failure to pay in cash or otherwise the amount of the capital stock of the company. Eleven of the defendants answered the complaint herein, each by a separate answer, and set up among other defences, that the plaintiffs' cause of action did not accrue within six years. These eleven defendants appeared by seven different firms and attorneys, as follows: the defendants Chamberlain and Baker, by Chatfield & Hadley; the defendants Bell, Roach, and Southmayd, by Beebe, Deane & Donahue; the defendants Van Wart and Banker, by D. Van Wart; the defendant J. L. Deen, by Rice & Hill; and three other defendants, by three separate attorneys. The cause was tried at circuit, at the city of New York, in June, 1862, and at the close of the plaintiffs' testimony, the plaintiffs were nonsuited, on the ground that the plaintiffs' cause of ac-

Harper *a.* Chamberlain.

tion was barred by the Statute of Limitations ; the court declining to pass on other questions involved, but intimating the opinion that the plaintiffs had sufficiently established a cause of action against a portion of the defendants.

On the trial, three different attorneys suffered default, and were not at all heard or represented, and from the commencement of the suit, only Chatfield & Hadley, Rice & Hill, and Beebe, Dean & Donahue had taken any active part in the litigation, or any part, except to serve the answers, and, in one instance, to serve one notice of trial.

Various of the defendants served bills of costs, intending and proposing to enter various judgments against the plaintiffs therefor, and claiming to be entitled each to bills of costs, and were noticing the same for adjustment on various days.

Plaintiffs procured a stay of proceedings, and made the present motion to restrict the defendants to one bill of costs, or for such order in relation to the costs as should be equitable.

J. Francis Walton, for the motion, cited *Code*, § 306; *Williams a. Hogan* (13 *How. Pr.*, 138); *Bulkley a. Smith* (1 *Duer*, 704).

Aaron J. Vanderpoel, *Alfred Smith*, *James K. Hill*, *Hiram F. Hatch*, and *Gilbert Dean*, opposed.

BARNARD, J.—Under the circumstances of this case, the parties defendant should not be restricted to one bill of costs.

The papers show that D. Van Wart, Beebe, Dean & Donahue, Rice & Hill, and Chatfield & Hadley, took charge of the suit for their respective clients from the commencement, to, and at the trial thereof.

They are entitled to full bills of costs as follows: D. Van Wart, one bill; Rice & Hill, one bill; Chatfield & Hadley, one bill; Beebe, Dean & Donahue, one bill.

As regards the other attorneys appearing in the case, it seems they were not present at the trial; the plaintiff might have taken their default, and perhaps taken an inquest against them. If he had so done, of course no question as to the costs of those attorneys could arise here. But, instead of doing this, he permitted a nonsuit to be entered against him as to all the defend-

Morton *a.* Campbell.

ants. His having done this should not wholly exempt him from paying costs to those who were in default at the trial. If, instead of allowing a nonsuit to be taken against him as to all the defendants, he had taken an inquest as to those who made default, there cannot be a doubt but that the court would have permitted the inquest to be opened, on payment of the trial-fee and cost of motion, and the defendants having thus got in, would in all probability, on a trial as to them, get back the trial-fee.

I think, therefore, that Charles L. Clark and J. M. Hatch are each entitled to have their costs up to and excluding the trial-fee; but they should have no costs of opposing this motion.

Van Wart, Beebe, Dean & Donahue, Rice & Hill, and Chatfield & Hadley, should each have \$10, costs of this motion.

S. Cromwell not having been represented on this motion, the plaintiff may take his motion as against him, without costs.

MORTON *a.* CAMPBELL.

Supreme Court, Second District; General Term, Sept., 1862.

BAIL ON ATTACHMENT FOR CONTEMPT. — SHERIFF. — ESCAPE. — WAIVER.

A sheriff who lets a prisoner under an attachment for contempt go at large on his executing a bond with one surety, is liable for an escape.

A bond taken from a prisoner under an attachment for contempt, with one surety instead of two, is irregular, not void.

After the sheriff had become liable for an escape in taking an insufficient bond from a prisoner in contempt, the prosecutor took an assignment of the bond after breach of its condition, and also took an order for a further attachment, but failed to issue such further attachment, and the prisoner was surrendered by his bail.

Held, a waiver of the prosecutor's right of action against the sheriff.

Appeal from a judgment.

This was an action by John Morton and John M. Canda against Anthony F. Campbell, sheriff of Kings county, for not

Morton a. Campbell.

holding a defendant to bail on an attachment issued, by the county judge of Kings, in supplementary proceedings. The plaintiffs had recovered a judgment against one Seth B. Cole for \$1,838.75; supplementary proceedings were instituted against Cole, property disclosed, a receiver appointed, and Cole was directed to transfer his property to such receiver. Cole did not comply with this order, and proceedings were instituted to punish his disobedience as a contempt. An attachment was issued to the sheriff, requiring him to produce the body of Cole at a time and place specified, and bailable in \$1,000. The sheriff apprehended Cole, and set him at large, on his executing a bond in \$1,000, with one George Hall as sole surety.

Cole did not appear on the return of the attachment, whereupon plaintiffs took an order for an assignment of the bond, and that a further attachment issue. Cole subsequently surrendered himself, whereupon the plaintiffs were requested to issue a further attachment, but declined to do so; the prisoner was thereafter released on habeas corpus.

The plaintiffs brought this action against the sheriff for an escape. The cause was tried before Mr. Justice Lott without a jury, and judgment was rendered for the plaintiffs for \$1,986.40, besides costs. The defendant appealed.

Philip S. Crooke, for the appellant.—I. The bond is good, and can be enforced. A bond is not void for being signed by one surety. (*Kesler a. Haynes*, 6 *Wend.*, 547.) The plaintiff cannot object that the sheriff accepted a bond with but one surety. The statute requires a bond with sufficient sureties. The plaintiff cannot hold the sheriff liable for taking no bond, and the plaintiff having entered an order for assignment and alias attachment, he has waived any objection to the sufficiency of the bond. The objection taken to the bond is, that it is taken "*colore officii*," and is void. The term "*colore officii*" is always taken in *malem partem*. (2 *E. D. Smith*, 503.) Again,—the plaintiff, for whose benefit it was taken, has ratified and adopted the act of the sheriff. He has become the sheriff's assignee, and the instrument is at all events available to him. (*Winter a. Kinney*, 1 *N. Y.*, 365; *Armstrong a. Gowan*, 6 *Cow.*, 465.) It is only in actions by the sheriff that such securities are held void, as taken *colore officii*. The act of a public officer exceed-

Morton *a.* Campbell.

ing his lawful authority, may be adopted by the party for whose benefit it is done. (Farmers' Loan & Trust Co. *a.* Walworth, 1 *N. Y.*, 433.)

II. A bond is void, as *colore officii*, only where the sheriff has taken more than the law permitted. (2 *Rev. Stat.*, 286, § 59.) The objection does not apply where less is taken than the officer had a right to exact. (21 *Wend.*, 57; 1 *Hill*, 298; 23 *Wend.*, 606; 1 *N. Y.*, 365.) The order for assignment and leave to issue another attachment has exhausted the plaintiff's rights. He has a right to sue the bond. It is available to him, even if void in the hands of the sheriff. (1 *N. Y.*, 433.) He has the right to issue alias attachment.

III. The only liability imposed upon the sheriff, after the plaintiff has taken an assignment of the bond, is to an action on the case, for wilfully taking insufficient sureties. (2 *Rev. Stat.*, 539, § 32.) He cannot be proceeded against until after action, judgment, and execution against the parties to the bond. And then only in case the officer had reasonable grounds to doubt their sufficiency.

IV. The sheriff cannot be held liable for more than the amount in which bail was ordered, \$1,000.

Britton & Ely, for the respondents.—I. The bond taken by the sheriff was not in compliance with the statute, in that it was executed by only one surety, and was for that reason void. (2 *Rev. Stat.*, 3 ed., 537, § 13; *Ib.*, 286, § 59; Bank of Buffalo *a.* Boughton, 21 *Wend.*, 57; People *a.* Meighan, 1 *Hill*, 298; Winter *a.* Kinney, 1 *N. Y.*, 365.) The sheriff must prepare the bond, and is responsible if it is defective. (2 *Rev. Stat.*, 3 ed., 539, §§ 16, 32.)

II. The assignment of bond to plaintiffs, by order of the court, did not release the sheriff from liability; a void bond cannot thus be rendered valid.

III. The order for a new attachment did not relieve the sheriff from his liability. The statute expressly gives the plaintiffs both rights. (2 *Rev. Stat.*, 3 ed., 539, § 27.)

IV. Neither were the plaintiffs estopped by the order for assignment and new attachment. 1. An estoppel is where one, by word or act, has designedly influenced another to do or not to do something, which, if he were permitted to deny, would

work some injury to the person so influenced. (Lawrence *a.* Brown, 5 *N. Y.*, 394; Farrell *a.* Higley, *Hill & D. Supp.*, 87; Griffith *a.* Beecher, 10 *Barb.*, 432; Ryerss *a.* Farwell, 9 *Ib.*, 615; Jewett *a.* Miller, 10 *N. Y.*, 402; Dezell *a.* Odell, 3 *Hill*, 215; Catlin *a.* Grote, 4 *E. D. Smith*, 296.) 2. The act of obtaining the order could at most have been but an admission that a valid bond had been taken, and admissions after an act never make an estoppel by relation back. (Pike *a.* Acker, *Hill & D. Supp.*, 90.) 3. Even the reaffirmance of a voidable contract is not conclusive, unless with full knowledge of the facts. If it were voidable, there is no evidence of any knowledge here. (Bronson *a.* Wyman, 8 *N. Y.*, 182-189.)

V. The damages are presumptively the amount of the judgment. (*Crocker on Sheriffs*, §§ 801, 856; Potter *a.* Lansing, 1 *Johns.*, 215; Patterson *a.* Westervelt, 17 *Wend.*, 543; 2 *Rev. Stat.*, 538, § 29.) 1. Cole's property, ordered to be conveyed, was worth much more than plaintiffs' judgment,—to wit, \$7,000. 2. The county judge would fine Cole, when brought before him, for contempt, the amount of plaintiffs' damage through his contempt, and the costs of the proceedings, and enforce the same by imprisonment. (2 *Rev. Stat.*, 3 ed., 538, §§ 21, 23, 24; Lansing *a.* Easton, 7 *Paige*, 364; People *a.* Spalding, 2 *Ib.*, 326; People *a.* Compton, 1 *Duer*, 513.)

BY THE COURT.*—EMOTT, J.—The bond taken by the defendant, as sheriff, upon the arrest of Seth B. Cole, was, in all respects, in conformity with the statute, except that it was executed by one surety only instead of two. The theory of the present action is, that such a bond was illegally taken *colore officii*, and is altogether void. The statute (2 *Rev. Stat.*, 286, § 66) enacts that "no sheriff or other officer shall take any bond, obligation, or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation, or security, taken otherwise than as herein directed, shall be void." The phrase *colore officii*, says the author of "*Termes de la Ley*," p. 156, is always taken in the worst sense, and signifies an act evilly done by the countenance of an office. At common law, and under the statute of 23 Henry VII., ch. 9, any instru-

* Present, BROWN, EMOTT, and SCRUGHAM, JJ.

Morton *a.* Campbell.

ment or agreement contemplating an act contrary to the duty of an officer, tending either to official oppression, or to the injury of a plaintiff or party interested in the process, was uniformly held void. Such instruments were not allowed to avail the officer, either in his own defence or against the party from whom they were obtained. Thus an agreement in writing with a bailiff holding mesne process either to put in bail on the return-day, or surrender the defendant's body, or pay the debt and costs, was held void, because it was given for more than the law justified; to wit: the appearance of the party. (*Rogers v. Reeves*, 1 *T. R.*, 418.) So where a sheriff took a bond of indemnity for delivering up a prisoner whom he had then in custody in execution for a debt, the bond was held void. (*Plowd.*, 60.) In this State the same doctrine has been affirmed in many cases, under statutes similar to the English Acts of Parliament. (7 *Johns.*, 139; *Ib.*, 426; 1 *Cow.*, 46.)

The section of the Revised Statutes which I have quoted, is a re-enactment of this rule, and the cases under it have adhered to the principle. Thus, in *Webber's Executors v. Blunt* (19 *Wend.*, 188), a promise to indemnify a sheriff for discharging a prisoner under arrest upon attachment, was held void. In *Willard v. Canfield* (5 *Ib.*, 61), it was held that bail or security taken by a constable for the appearance of a defendant, against whom the constable held a warrant from a justice in a civil action, was void, and that a deposit of money made with the person becoming security, to indemnify him, might be recovered back. These are some of the cases in which securities or agreements have been held void as contravening the statute, having been given in cases not allowed by law. So also bonds, undertakings, or agreements, made or taken in a manner not allowed or provided by law, are wholly void.

This is the other case referred to in the statute. (2 *Rev. Stat.*, 286, § 66.) Among instances of the violation of this provision may be mentioned such as the following: a bond taken in a bastardy proceeding, conditioned not only as the statute requires for the indemnity of the town, &c. (1 *Rev. Stat.*, 650), but also for the payment of such sums for the support of the mother and child as the justice issuing the warrant, or his associate in the Court of Sessions, should direct, was held utterly void. (*People v. Meighan*, 1 *Hill*, 298.) So where an attachment had issued on

a rule of course, and without any order fixing the amount of bail, and the sheriff had taken a bond in a penalty of \$4,000 on discharging the defendant, the bond was held void for the excessive penalty. (*Bank of Buffalo a. Boughton*, 21 *Wend.*, 57.)

It is very clear in this case that the bond taken by the sheriff is not within the scope of the statute, as taken in a case not allowed by law. The question then arises, whether although taken in a case which the law directs, and with the condition which it requires, it was taken in a manner not allowed by the law and is utterly void, because it was given by one surety only, when the statute requires two. There has been no authority cited which goes to such a length. In *Keeler a. Haynes* (6 *Wend.*, 547), the court held that where a sheriff took a replevin bond with one surety the proceedings were not even irregular, so as to justify treating the defendant as in default. The Statute of Replevin is not quite as explicit as that of Contempts, in regard to the number of sureties in the bonds which they severally provide for; but the Replevin Act speaks of sureties in the plural, which implies that more than one is called for. No doubt in the present case the plaintiffs might have objected to the bond taken by the sheriff, and held him liable for an escape. But the proceeding of the sheriff in accepting one surety where he ought to have demanded two, can hardly be said to come within either the letter or spirit of the statute. It cannot be said to contemplate either the oppression of the defendant or the injury of the plaintiffs in the process, any more than would taking insufficient sureties in a similar case. The statute is aimed at the oppression of the defendant, or the wilful injury of the plaintiff, where it speaks of the "manner" provided by law for any bond, obligation, or security, it refers mainly, if not altogether, to the terms and condition of the instrument, to an obligation which exacts either more or less than the law requires in a given case. In the language of Lord Kenyon, in *Fuller a. Prut* (7 *T. R.*, 109), an officer is not to be allowed to fix the price of his own indulgence, instead of complying with the provisions of the statute.

If this case had stood upon the action of the sheriff only, and if it appeared that he had discharged the prisoner upon a bond with one surety, and that the plaintiff had done nothing to adopt his act, no doubt he would be liable for an escape. But the

The People *on rel.* Reilly *a.* Johnson.

parties to an action may enter into agreements which are forbidden to officers holding their process, and may enforce such agreements. (Winter *a.* Kinney, 1 *N. Y.*, 365, and the cases there referred to.) The bond taken in this case is not utterly void as forbidden by statute, or taken corruptly *colore officii*. It was irregular, and the plaintiffs were not bound to receive it. If they did not receive it, they might have held the sheriff, as I have said, for an escape of the prisoner. Whether the bond in such a case could be made at all available to the sheriff is a question. But if the plaintiffs waived all objections to the bond on account of its having been given by one surety only, it would not lie with the obligors in the bond to dispute their obligation upon it. Of course they could not successfully do so, unless their obligation was already void, and not when it is merely irregular or even voidable.

After the sheriff in the present case had returned the attachment against Cole and produced the bond which he had taken, Cole having failed to appear, the plaintiffs obtained an order for the assignment to them of the bond, and for the issuing of a further attachment. After this, Cole was surrendered by his bail, but the plaintiffs failed to issue their further attachment, and he was discharged.

I am of the opinion that by these proceedings the plaintiffs waived the irregularities of the sheriff's proceedings, and accepted his acts and the security which he had taken, at least so far as to excuse him from liability for an escape.

The present judgment should be reversed, and there should be a new trial.

THE PEOPLE *on rel.* REILLY *a.* JOHNSON.

Supreme Court, First District; General Term, Oct., 1862.

RES ADJUDICATA.—EVIDENCE.—LANDLORD AND TENANT.—SUMMARY PROCEEDINGS.

Facts found by a former decree, which are not necessary to uphold the decree, do not conclude the parties.

The People *on rel.* Reilly *a.* Johnson.

A judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it.

In order to make a judgment-record evidence to conclude any matter, it should appear that such matter was in issue.

A judgment obtained in an action brought to have a deed declared to be merely a mortgage, which declares it to be a deed and not a mortgage, although it also declares that the grantor is tenant of the grantee, is not evidence on this latter question.

Certiorari to a justice of a district court in the city of New York.

The relator was Thomas Reilly; the defendants were Frederick Johnson and James D. McMann. In February, 1861, the defendants presented to C. W. Van Voorhis, justice, the affidavit of Frederick Johnson, one of the defendants, and demanded process to remove the relator, Thomas Reilly, from the premises known as Hermitage Hall, in the city of New York, upon the ground that Reilly was a tenant of the defendants, holding over after the expiration of his term, without the leave of his landlords. The justice issued a summons against Reilly, requiring him to remove from said premises, or to show cause to the contrary on the same day. On the return of such summons, Reilly interposed a counter-affidavit, and demanded a jury trial.

The landlords introduced in evidence a judgment-record of the Supreme Court of the city of New York, in an action prosecuted by the relator as plaintiff against Charles G. Cornell and the present defendants, to declare a deed given by Reilly to Cornell and Johnson, while in possession of the premises now in question, a mortgage. Judgment had been rendered for the defendants. The alleged tenancy in the present proceeding was for a time subsequent to the execution of the deed. It appeared in that case, that Reilly had paid to the defendants certain money, which was mentioned in the findings of fact in the case in the Superior Court as follows:

"It was also verbally agreed between them, that for the said three months the plaintiff should remain the tenant of said Cornell and Johnson at a rent of \$23 a month, payable at the end of each month, besides paying all he had agreed to pay under the agreement for the tenancy of the premises during the first six months after the purchase of Cornell and Johnson. The plaintiff paid rent and said sum of \$250 in pursuance of the said

The People *on rel.* Reilly *a.* Johnson.

verbal agreement, but has wholly failed to pay any rent since, and has had the occupancy of the premises since the commencement of this action, which was on or about March 22, 1860, by virtue of an injunction-order made in this action."

The record in this case and the foregoing finding were relied on by the landlords to establish the conventional relation of landlord and tenant to exist between the parties. The result of the trial was a verdict in favor of the landlords, upon which a warrant was issued, and Reilly was dispossessed, and Johnson and McMann were put in possession of Hermitage Hall.

Upon the judgment entered upon this verdict, a certiorari was now taken to review it in the Supreme Court.

Eusebius W. Dodge, for the relator.—I. The judgment-roll was improperly received. The only point at issue in the Superior Court was whether the deed of Reilly was a mortgage for the payment of \$5,600. This issue in no wise involved the question whether Reilly was, or was not, the tenant of Johnson and Cornell. (*Jackson a. Wood*, 3 *Wend.*, 27.)

II. If the judgment-roll was properly allowed, the relation of landlord and tenant is not shown to have existed between the parties. The answer of Cornell and Johnson alleges a verbal contract between Reilly and Johnson and Cornell, by which Reilly was permitted to purchase back the property at any time within six months afterwards, upon refunding the \$5,600, and paying Cornell and Johnson a bonus of \$500; that, at the expiration of said six months a further agreement was made, continuing the parol contract for the sale of the premises for the further term of three months, with a further condition that Reilly should pay as rent all taxes and assessments, and the interest upon a mortgage of \$7,500, and \$196, the interest on the advance of \$5,600, and the interest for the same amount for the ensuing three months, and the further bonus of \$250 to Johnson for his consent to such prolongation of the agreement. The answers allege that under this agreement the bonus of \$250 and the \$196 of interest in arrears was paid on the day the last agreement was made. The nine months' time covered by this parol agreement is the same period of time embraced in the affidavit of Johnson in this case, and during which he claims that Reilly was his tenant. It is submitted that this

agreement was for a purchase, and established the relation of vendor and vendee, and not that of landlord and tenant, and the payments made by Reilly were made under this agreement. (Burnett *a.* Scribner, 16 *Barb.*, 621; Williams *a.* Bigelow, 11 *How. Pr.*, 83, 88; Evertson *a.* Sutton, 5 *Wend.*, 281, 284; Roach *a.* Cosine, 9 *Id.*, 227, 231, 232.)

III. The defendant's evidence is plainly contradicted by their own affidavits in previous proceedings of the same character, and such former proceedings should have been held a bar.

Luther B. Peet and *John Graham*, for the respondents.—I. Taking it to be the office of the court upon a certiorari to examine into and pass upon the justice of the verdict of the jury, and the judgment thereon, as well as to correct errors of law, and see to the regularity of the proceedings before the justice, both must be sustained. (Anderson *a.* Prindle, 23 *Wend.*, 616; Niblo *a.* Post's Administrators, 25 *Id.*, 280; Benjamin *a.* Benjamin, 5 *N. Y.*, 383.) The judgment of the Superior Court found that Reilly was conventionally the tenant of Cornell and Johnson. The jury found the existence of a tenancy, its termination, and a holding over by Reilly, without the permission of his landlords.

II. The judgment-record in the Superior Court action, was eminently proper as evidence against Reilly on the trial below. The parties to the judgment were the same, it was the decision of a court to which he himself had appealed to settle the relation of the parties. He demanded the premises in that action as owner, and insisted that the defendants were but mortgagees. The court decided that they were owners and that he was their tenant. (*Greenleaf on Ev.*, §§ 522, 523, 536.) For the rule as to the conclusiveness of judgments, see, also, Campbell *a.* Hall (16 *N. Y.*, 575); Castle *a.* Noyes (14 *Id.*, 329); Davis *a.* Tallcot (12 *Id.*, 184).

III. Although the court has the power by statute to examine "any adjudication" made by the officer below (3 *Rev. Stat.*, 5 ed., 839, § 47), it ought, and has the right, to require such matters to be presented upon exceptions. Otherwise, the very proceedings which the tenant suggested or approved of before the officer below, might be urged as error upon the certiorari.

IV. To reverse the proceedings below, would not entitle the

The People on rel. Reilly a. Johnson.

tenant to restitution, nor would it invest him with a very profitable action on the case for damages. Both these results would be unattended with any benefit, after the Superior Court judgment.

BY THE COURT.*—MASON, J.—It seems to me very clear in this case, that the court below erred in allowing this record in the suit in the Superior Court between Reilly and these defendants and Cornell to be given in evidence to establish the fact, that the conventional relation of landlord and tenant existed between the parties.

The object of that suit was to have the deed given to Cornell and Johnson declared to be a mortgage only to secure the repayment to them of the principal sum of \$5,600 advanced by them to Mr. Shea, and the interest thereon; and the only question really in issue in that suit, so far as these parties were concerned, was whether the deed held by Johnson and Cornell was held by them as a mortgage to secure the payment of the said sum. The decree of the Superior Court dismissing the suit and complaint, only adjudged the fact that they did not hold the deed as a mortgage, and that Reilly was not entitled to a decree declaring that deed a mortgage to secure the payment of \$5,600. The issue in that suit in nowise involved the question whether Reilly was or was not the tenant of Cornell and Johnson, and consequently the judgment-record in that case could not be evidence of the fact.

It is only necessary to state a few familiar principles of law to show that must be so. It is a familiar rule of law, that facts found by a former decree which are not necessary to uphold the decree do not conclude the parties. (*Coit v. Tracy*, 5 *Cow.*, 265, 276; 2 *Cow. & Hill's Notes*, 917, and cases there cited.)

And though a decree in express terms profess to affirm a fact, if such fact was immaterial in the case, the decree will not conclude the parties as to such fact. (2 *Day*, 138; 8 *Conn.*, 268.)

A judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. (2 *Cow. & Hill's Notes*, 826.)

In order to make a record evidence to conclude any matter,

* Present, LEONARD, CLERKE, and MASON, JJ.

 Johnson *a.* Smith.

it should appear that that matter was in issue. (Manning *a.* Harris, 2 *Johns.*, 44; Jackson *a.* Wood, 3 *Wend.*, 27; 1 *Est. Cas.*, 43; 4 *Cow.*, 276; 4 *Day*, 274, 431.)

The fact whether Reilly was or was not the tenant of Johnson and Cornell not being in issue in that suit, and the fact being wholly immaterial to support the judgment given in that case, the record is not evidence to establish the fact. That this fact, although found by the judge as fact in his findings, was wholly immaterial, and that the judgment given in that case did not in the least rest upon that, is most manifest from the pleadings in the case and the judgment itself.

The relief which the plaintiff Reilly demanded in his complaint in that suit was, that the said deed to Cornell and Johnson might be declared to be a mortgage, and stand as security for \$5,600, and that they be enjoined from asserting any other or different title to the said premises under the said deed, &c. It follows, therefore, that the court below erred in allowing this record to be put in evidence to establish the relation of landlord and tenant between these parties. The court also erred in submitting this record to the jury, and in submitting it as a question for the jury whether this record did or did not show that Reilly was the tenant of Johnson and Cornell. The jury must have found the fact from this record alone, for there is no other evidence in the case from which they could find it.

I advise the reversal of the proceedings in the court below, with costs to be taxed.

Judgment for the relator.

JOHNSON *a.* SMITH.

New York Common Pleas; General Term, May, 1862.

ACTION ON JUDGMENT AGAINST JOINT-DEBTORS.—DEFECT OF PARTIES.

Where a judgment has been recovered against joint-debtors, under a service of process upon one only, it is not a valid defence to an action upon the judgment, that the party served with process in the former action is not joined as a defendant.

Johnson *a. Smith*.

Where two joint-debtors have been sued in a justice's court, and only one served with process, and judgment is recovered by the plaintiff, he may proceed by a new summons and complaint against the debtor not served, stating, in the complaint, the former action, and the facts showing the liability of the present defendant; and may recover judgment against such defendant. This is, in effect, the procedure prescribed by the Code for courts of record, and its adoption in justices' courts preserves the uniform course of proceeding.

Appeal from a judgment of the Fifth District Court, in the city of New York.

This action was brought by George W. Johnson and James M. Wallace, against Charles Smith. The complaint set forth a cause of action against defendant and one George Wells, as partners, for goods sold, in the sum of \$57.58, and then averred that in an action against Wells and Smith, in the same court, judgment had been recovered against Wells and Smith, on a service of summons upon Wells only, for \$72.75; and the plaintiffs now demanded judgment against Smith, for the last-named sum.

On the return of the summons, defendant objected that a non-joinder of a party who should be made a defendant appeared on the face of the complaint. Plaintiffs applied for leave to amend the summons, by adding George Wells as a party defendant. The justice denied the motion, and rendered judgment for the defendant.

The plaintiff appealed to this court.

Francis Byrne, for the appellant.

John Anderson, Jr., for the respondent.

BY THE COURT.*—BRADY, J.—The plaintiffs could maintain an action against the defendant and his partner Wells, although the latter had been served in a former action, and judgment had been rendered against him. (Carman *a. Townsend*, 6 *Wend.*, 206.)

Whether the defendant Smith could be sued alone, after the judgment, does not appear to have been considered heretofore, and I believe has not been decided in any reported case. The original indebtedness as to the partner served with process, is

* Present, DALY, F. J., HILTON and BRADY, JJ.

Johnson *a. Smith*.

merged in the judgment,* and the proceeding against him is on the judgment rendered. The defendant not served would have the right to interpose any defence of which he could have availed himself in the former action. (*Carman a. Townsend, supra.*) The judgment against him was not conclusive. It was evidence only of the extent of the plaintiffs' demand, after the defendant's liability should be established by other evidence. (*Oakley a. Aspinwall, 4 N. Y., 513; 2 Rev. Stat., 377, § 2.*)

The action would be anomalous in this view of it, because the issues would be different as to each defendant.

The complaint in this case avers the judgment against the joint-debtor Wells, in a former suit commenced against both, and also the facts showing the liability of the present defendant, as the other joint-debtor. I do not understand what objection there can be to this form of procedure. It is simple, direct, and I think just to the defendant Wells. It is scarcely possible that he can have an individual defence. Why subject him then to the expense of another suit? He is already declared to be the plaintiffs' debtor. As to him, the law has declared its judgment, and now, by allegations showing that the defendant Smith is a joint-debtor with him, the plaintiffs ask a judicial determination of that liability, so that his personal property may be reached. Such, in effect, is the proceeding in courts of record under the Code. Section 375 provides that joint-debtors, not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment, and the proceeding goes on against them only. Permitting, in effect, a similar practice in justices' courts, will tend to establish that "uniform course of proceeding in all cases," declared in the preamble of the Code to be expedient. I think the justice was wrong in dismissing the complaint, and that the judgment should be reversed. I have not deemed it necessary to determine whether the justice had power to amend the summons in this case, regarding the amendment, as I do, unnecessary.

* Compare *Mallory a. Leach, infra, 449, note.*

MATTER OF ST. ANN'S CHURCH.

Supreme Court, Second District; Special Term, May, 1862.

RELIGIOUS CORPORATION.—AUTHORITY OF TRUSTEES.—SALE OR MORTGAGE OF REAL ESTATE.

The vestry or trustee of a religious corporation are its managing agents and may act for it as fully as the directors or agents of other corporate bodies.

It is no objection to an application by the vestry or trustees of a religious corporation for leave to sell or mortgage its real estate that such application is not authorized by an express vote of the corporation, where neither the good faith of the application or the propriety of the proposed disposition is questioned.

Application by St. Ann's Church, in Brooklyn, for leave to mortgage certain real estate.

The application was made upon petition of a committee of the vestry of the church, the rector of the church, and the clerk of the vestry, signing the same, setting forth,—

“That St. Ann's Church is regularly incorporated, owns in fee simple the real estate sought to be mortgaged, and that the money to be obtained is to be used in erecting buildings upon said real estate.”

Annexed to the petition was a copy of the resolution of the vestry, setting forth the facts, which showed that the meeting was legally convened, that a majority of the vestry passed the resolution, and setting forth the resolution appointing the committee which directed them, on the part of the church, to apply for the permission of the court to mortgage certain real estate described in schedule annexed, and to obtain the loan desired.

William Peet, for applicants submitted the papers.

John Greenwood, for the parties making the loan, called the attention of the court to the case of *Wyatt v. Benson* (4 *Abbotts' Pr.*, 182; S. C., 23 *Barb.*, 327), and submitted that the papers of applicant were defective, it not appearing that a ma-

majority of the congregation made the application or consented thereto.

EMOTT, J.—The papers upon which this application is made are exceedingly brief. They do not disclose in what particular manner the interests of the church will be promoted, by borrowing the money for which these mortgages are to be given, except that it is to be used in erecting buildings upon certain real estate of the society. What these buildings are to be, or how their erection is to benefit the church, is not stated. The application is opposed by counsel representing a person who proposes to advance or lend the money on these securities. His opposition does not, however, turn upon any question or denial of the fact that the use which the society intend to make of the money will be beneficial to them. It was assumed on the argument on both sides, although it does not appear in the papers, that the purpose of the contemplated erections, and consequently of this loan, is to improve the property designated in order to increase its revenues.

The objections suggested to granting an order, permitting the church to mortgage its real estate, rest upon a different ground. They proceed upon the theory, that the application to execute such a mortgage cannot be made or authorized by the trustees, but that a majority of the corporators must ask for the authority and sanction the act; in short, that an application to sell or mortgage the real estate of a religious corporation must be made or directed by a vote of the congregation, and not merely of the vestry or trustees.

It may be confessed that such a view is, to some extent, sustained by the case of *Wyatt v. Benson* (4 *Abbotts' Pr.*, 182; S. C., 23 *Barb.*, 327). It will be found, however, upon careful examination of the facts in that case, that such a rule does not necessarily result from that decision. That was a bill filed to stay proceedings for a sale of the real estate of a religious corporation, which had been instituted under the statute, upon the application of the trustees, but which had not been completed. It was shown to the satisfaction of the court that a large majority of the corporators, or members of the religious society in question, were opposed to the sale. That sale involved the removal of their place of worship, and there were special reasons

and circumstances in the case calling at least for consideration and delay. So far as the case holds that a court of equity may be invoked to restrain proceedings of the trustees of religious corporations, and perhaps, to annul their acts on the ground that these proceedings are a violation of their duties, and in effect, a fraud upon the corporation and its members, the decision may be sustained. What circumstances will justify the interposition of the court, must, of course, be a question to be determined in each particular case, upon its own state of facts. But so far as the reasoning of the learned judge in that case was intended, or may be understood to hold, that the courts cannot entertain an application for liberty to mortgage or convey the real estate of a religious corporation, unless it is made or directed by a vote of the corporators, I am unable, with great respect for the able and ingenious reasoning by which such a view is supported, to agree to that proposition. I dissent from the proposition and its results with the less hesitation, because it is, I believe, opposed to the practice in such cases throughout the State until the present time. I have conferred with my associates in this district, and I learn that it has been and continues to be their uniform custom, as it has been mine, to grant such applications when duly made and sanctioned by the vestry or trustees of such corporations.

It is quite true, as the learned judge observes in *Wyatt v. Benson*, that the statute authorizes the court to authorize the conveyance of the real estate of a religious society or corporation, upon the application of the corporation. It is also true that the corporation consists of every member of the religious society entitled to vote at its elections. But it does not follow that there can be no valid act of such a corporation unless it is sanctioned or directed by a vote of a majority of the corporators. No doubt it is intended that the control of the temporal affairs of these religious corporations shall be placed and preserved in the hands of the corporators. But the offices which the statute creates in such corporations, are made and are filled for the purpose of providing for the management of their temporal affairs. The officers chosen are not trustees in the sense in which an individual becomes a private trustee, but are simply officers of the corporation. As such officers they represent the corporation, they are its managing agents, and they may

Matter of St. Ann's Church.

act for it as fully as the directors or agents of an ordinary corporation may act in its behalf. The corporation ordinarily acts through its officers, and through them only. The power of managing its concerns is delegated to its officers for the common benefit of themselves and the other corporators. These officers are liable, it may be, to judicial proceedings to control their action, when it is fraudulent or destructive of the rights and interests of the corporation. They are responsible, however, more directly and practically to the corporate body itself, through the power of the corporators to supersede them at their elections. But as long as they are in office they are the managing agents of the corporate body, and we are not required to go behind their action, or to demand the express sanction of their constituents or of the whole body of corporators to any corporate act, when, as in this case, the good faith of the transaction is not impeached, nor even its propriety questioned.

This is the rule to be gathered from the views expressed by the Court of Appeals, in *Robertson v. Bullions* (11 *N. Y.*, 243). Indeed, the views I have now stated are taken in almost so many words from the opinion of Judge Selden in that case. It certainly does follow from the statutes, as they are expounded by the court in that case, that a religious society incorporated under the act consists of the members or electors of the society, and not merely of its trustees. But it does not follow that these trustees have less powers than the officers of other corporations, or that they may not act for the corporation in respect to its property and affairs, in the same manner as the officers of other corporate bodies.

In the absence of any restrictions upon their power in respect to such an application as the present, it seems as clear to me that the vestry or trustees of a church may apply to the court to be allowed to sell or mortgage its real estate, as it is that these officers, and they only, can complete the transaction when it has been authorized.

I have no difficulty in adhering to the practice which has prevailed in these cases, and the order asked by this petition will, therefore, be granted.

Meech *a.* Loomis.

MEECH *a.* LOOMIS.

New York Superior Court; At Chambers, July, 1862.
Again, At General Term, November, 1862.

RELEASING DEFENDANT FROM ARREST.—EXECUTION AGAINST PERSON.

The fact that a plaintiff has consented to the release of a defendant from arrest under an order issued as a provisional remedy, does not prevent his issuing execution against defendant's person, after judgment in the cause.

Motion to set aside execution against the person.

This action was brought by Alexander Meech against Kellogg H. Loomis. The defendant was taken into custody under an order of arrest, requiring bail in the sum of \$200, which defendant was unable to give. Algernon S. Sullivan, at the instance of the wife of the defendant, called on the attorney for the plaintiff, and proposed to deliver to him a watch and chain and certain articles of jewelry, to be held by him as security for the debt alleged to be due to the plaintiff, on condition that the defendant should be released from arrest. The attorney for the plaintiff consented to receive the articles on the terms proposed, with the understanding that he was to have the privilege of consulting his client, and if he did not approve of this arrangement, the articles were to be returned. The following receipt was given:

“Received from Mr. Loomis, a lady's watch, chain, and trinkets, to be held as security for payment by said defendant of the amount claimed in said suit and costs, and defendant to be released now from arrest.

A. H. REAVEY.

“New York, August 31, 1861.”

It was also stipulated, that the defendant should pay \$50, the costs of the plaintiff. The defendant paid \$42, and was discharged from arrest. On the following day, Mr. Reavey notified Mr. Sullivan that his client refused to accept the articles depos-

ited with him as security, and stated that they were at his disposal. They were subsequently returned to the counsel for Mr. Loomis. The cause was afterwards tried before Mr. Justice Monell, who found that the defendant was guilty of fraud in contracting the debt, and awarded the plaintiff the amount claimed in the complaint. Judgment was entered against defendant for \$148.68.

After the return unsatisfied of an execution against defendant's property, an execution against his person was issued, under which defendant was taken into custody.

He now moved to set aside the latter execution.

John Cook, for the motion.—I. The consent and discharge of the defendant from custody, under the order of arrest before judgment, extinguished the alleged charge of fraud as the ground of arrest under section 179 of the Code of Procedure. A contract in writing was made by the plaintiff's agent for a consideration, which effectually discharged the defendant from arrest, and thereby the order of arrest was ended. (*Union Bank a. Mott*, 9 *Abbotts' Pr.*, 106 ; *King a. Kirby*, 28 *Barb.*, 49.)

II. To justify the arrest of a defendant upon execution, the order of arrest should remain in full force at the time of the issuing of such execution. (*Corwin a. Freeland*, 6 *N. Y.*, 560 ; *Kindenburg a. Morgan*, 18 *How. Pr.*, 469.)

III. The consent and release shows upon its face that it was given at its date without any condition attached to it, and the attempt to alter it by affidavits should not be considered by the court. It is an unconditional contract on its face, by which the plaintiff surrendered his right to hold the defendant's person. This contract was made by the plaintiff and defendant, and before it could be changed, as expressed, the law maintains that each of the contracting parties must expressly agree to the change or alteration, which is not the case here. (See cases above cited.)

A. Hamilton Reavey, opposed.—I. The Revised Statutes of this State conform to the common-law practice, in all cases in which they give a right to an order of arrest ; they also give, in the same cases, a right, after judgment, to an execution against the body of the defendant.

II. It is conceded to be a general rule of law, that a defendant who has been once holden to bail, cannot be held to bail a second time for the same cause of action. The old cases in 2 *Str.*, 1209; 6 *T. R.*, 219; and 7 *Taunt.*, 192, have been recognized to be unquestioned law to this day. The present case is not within the principle; the writ issued against him is not a writ to hold him to bail a second time for the same cause of action, but it is the issue of an execution against his body, to satisfy a judgment obtained against him, in a case in which he had only once been taken into custody on an order of arrest.

III. It is admitted, that if a defendant be once in execution, and is afterwards discharged by the plaintiff, even if done upon conditions, and the conditions are not afterwards fulfilled, or upon giving a security which turns out to be worthless; even although there was an understanding at the time, that he should be liable to be retaken, still the debt is discharged. (4 *Burr.*, 2483; 1 *T. R.*, 557; 2 *East*, 243; 3 *Wend.*, 184; 9 *Cow.*, 128.) This rule, however, has no application to this case. Defendant has never been taken upon execution before, nor has he been released from an execution, either upon or without conditions. Shall it be said, that because plaintiff consented that the defendant, on the order of arrest, should not give special bail to the action, but be discharged on common bail, that he shall not have one execution, or, in other words, one final process to collect his debt?

IV. If the body of the defendant cannot be taken in execution, because the plaintiff consented that he need not give bail on the order of arrest; then, to permit a party to go without bail, when in custody upon an order of arrest, is, in law, a discharge or satisfaction of the defendant, for which the order of arrest was obtained. Because, where the body has been once in custody upon an execution, the law deems it to be a satisfaction of the debt. (1 *Cow.*, 56; 5 *Wend.*, 58.)

V. The doctrine of the law is, that a plaintiff can hold the defendant to bail but *once*, for the *same* debt, and that he can take his body but *once*, in execution. It has never been decided, that where a defendant is in custody on a *capias ad respondendum*, and the plaintiff consented that he might go without bail, that the plaintiff, for that reason, could not, after judgment, have a *capias ad satisfaciendum* against his body.

MONELL, J.—After the defendant had been arrested, under an order of arrest in this action, and while in the custody of the sheriff, he transferred to the plaintiff's attorney certain articles of personal property, which it was agreed should be held "as security for payment by said defendant of the amount claimed in said suit, and defendant to be released now from arrest." Thereupon, the defendant was discharged from custody. It is averred, in the moving affidavits, that by reason of such consent, the order of arrest became vacated before the entry of judgment. No vacation of the order by a judge of this court appears to have been made, and the most that can be claimed is, that the consent of the plaintiff's attorney, releasing the defendant from arrest, *operated* as a discharge of the order.

Subsequently, the plaintiff obtained judgment for the amount claimed in his complaint.

The complaint alleged facts, showing that the debt had been fraudulently contracted by the defendant, and the judgment so adjudged. Upon a return unsatisfied of an execution against the property of the defendant, an execution against his person was issued, and he was arrested.

A motion is now made to set aside this last execution, on the ground that the defendant having been discharged from arrest, upon the order of arrest, cannot be arrested upon an execution issued upon a judgment in the action.

Had the order of arrest been *vacated*, it might be a question whether an execution could issue against the person of the defendant. The consent to release the defendant from arrest, did not operate as a vacation or discharge of the order of arrest.

At most, I think it is to be regarded in the light of a voluntary escape, or like the entry of common bail, under the old practice. I do not understand, that in such cases, under the former practice, the defendant could not be arrested upon *final* process. A discharge, or an escape, voluntary or otherwise, from arrest, upon *mesne* process, never precluded a subsequent arrest upon *final* process.

Had the order of arrest been discharged, it might be as if no order had been granted; and in that case, I think, an execution against the person could not be issued.

The allegation of fraud in the complaint, in an action of this kind, could not of itself authorize the execution.

Hart *a.* Kennedy.

The counsel for the moving party has not furnished me with any citations to authority for his motion; nor can I, upon an examination of the books, find any.

Upon principle, I see no reason for setting aside the execution. The motion must be denied, with costs.

An appeal was taken by the defendant from the foregoing decision, to the general term. The appeal was heard before all the justices, November, 1862, and the order affirmed, with costs.

HART *a.* KENNEDY.

Supreme Court, First District; Special Term, August, 1862.

EXEMPTION OF METROPOLITAN POLICE OFFICERS FROM SERVICE OF PROCESS AND SUBPŒNAS.—POWER OF COMMISSIONERS TO MAKE RULES.—VACATING ORDER OF ARREST.

The last clause of section 34 of the Act establishing the Metropolitan Police (*Laws of 1860, 446, ch. 259*).—providing that “no person holding office under this act shall be liable to military or jury duty, nor to arrest on civil process, or to service of subpœnas from civil courts, whilst actually on duty,”—is to be read as meaning, “nor, whilst actually on duty, to arrest on civil process, or to service of subpœnas from civil courts.”*

The superintendent and the captains, since they are charged with a constant supervision of the operations of the force, are to be deemed always on duty, so that they are exempt at all times during the continuance of their terms of office, while prepared for duty.

Patrolmen of the force are not to be deemed actually on duty during their fixed and known intervals of remission from duty.

The power given to commissioners of police by section 27 of the act, to make general rules, does not authorize a rule declaring that officers shall be deemed always on duty, which can conclude the courts in determining a question of exemption.

Except in aggravated cases, an order of arrest against a public officer of the peace should not be granted; but if it has been granted it should not be set aside by another judge on the grounds of mere expediency, but, at most, the bail should be reduced.

In the case of a subordinate officer, whose acts, which form the cause of action, were done in obedience to commands of a superior, the bail may, in the discretion of the court, be reduced to a nominal sum.

* Compare Squire's Case, 12 *Ande*, 38.

Hart a. Kennedy.

Motion to vacate orders of arrest.

This was an action against John A. Kennedy, superintendent of the Metropolitan Police, Captain Davis, a captain of police in that force, and several patrolmen of the force, for false imprisonment. Orders of arrest against all the defendants were granted by a justice of the court as a provisional remedy under the Code, and the defendants now moved to vacate these orders.

A. Oakey Hall, for the motion.

Gunning S. Bedford, Jr., opposed.

CLERKE, J.—Although the collocation of the last clause of section 34 of the Metropolitan Police Act (*Laws of 1860*, 446, ch. 259) is not in conformity with the rules of composition which lead to precision in style, yet there can be little doubt that the words “whilst actually on duty” have relation to the subject of “arrest on civil process,” as well as to that of “the service of subpœnas from civil courts.”

If the words “whilst actually on duty” were intended to be restricted to the latter, it is to be presumed care would have been taken, in a matter of so much importance, to place the restriction beyond the possibility of a doubt, by inserting these words after the conjunction “or,” so that they would read thus: “or, whilst actually on duty, to service of subpœnas from civil courts.”

But in the present position they are separated from each of the preceding clauses by a comma, and may be considered as applicable to both, as if they were inserted after the word “nor,” so that the last division of the section may read thus: “nor, whilst actually on duty, to arrest on civil process, or to service of subpœnas from civil courts.”

This would have been the correct collocation of these clauses; but I have no doubt that the present collocation admits of the same meaning, and no other. Therefore, in my opinion, the Legislature intended by this section to exempt persons holding office under the Metropolitan Police Act from arrest on civil process, only “whilst actually on duty.”

The 27th section of the act gives authority to the commissioners to enact, modify, and repeal rules and regulations for

Hart a. Kennedy.

the furtherance of the police government of the district, and for promoting and perfecting the discipline of the force.

The 60th section of the general rules, adopted by the commissioners pursuant to this section, declares that the superintendent, inspectors, captains, and sergeants of police will be "deemed always on duty;" and it is contended that this rule is so efficacious as to require us to decide that they are always actually on duty, so that, under the 34th section of the act, none of them can be arrested on civil process.

Assuredly the 27th section has not given the commissioners the power to enact that a state of things exists which does not exist: to declare that members of the police force are actually on duty when they are not actually on duty, and to deprive the courts of justice of the power to determine the fact according to the evidence.

The 27th section gives the commissioners the power to devise regulations for the internal government of the police force, just as it gives corporations, public and private, the power to enact by-laws; but it has not given to either the capacity to modify an act of the Legislature, or to assume the existence of a fact which would have that effect.

If the members of the police are not actually on duty, the declaration of the commissioners that they are on duty, can have no legal or moral effect; if they are actually on duty, the courts will not require the sanction of the commissioners' previous declaration to determine the fact. Still, in determining the fact whether the members of the police force are actually on duty at a given time, it is proper to consider the nature and extent of the duty to which the person, for whom the exemption is claimed, is liable.

The patrolmen have certain intervals of remission from duty, fixed and known, during which they are not liable to duty; but this can scarcely be affirmed of the superintendent. No doubt he has certain hours for taking his meals and taking sleep; but as he has a general and unremitting supervision over the operations of the whole force, and as his directions and advice in a city like this may be necessary at any time, he is liable to be called to interfere at any hour of the day or night, so that it is not at all unreasonable to say that he is always "actually on duty." The same may be affirmed of the captains; although

Hart v. Kennedy.

their supervision is not as extensive, it is as constant as that of the superintendent.

I think, therefore, this exemption in the 34th section may be extended under all circumstances to the superintendent of police and the captains, and they may be considered, according to the true intent and meaning of that section, as not at any time during the continuance of their term of office, while prepared for duty, liable to arrest on civil process. The result then is, that Kennedy and Davis (the superintendent and captain) should not be held under these orders of arrest, and that the other defendants in these several suits (being patrolmen) should be held.

But as these men acted under the orders of their superior, the bail should be reduced to a nominal sum; particularly as this provisional remedy, not being an absolute right in any case, rests in a great measure in the sound discretion of the judge, who may refuse it altogether, if he thinks the arrest is not necessary to secure the presence of the defendant, in order to render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment that may be recovered in it.

When a public officer, holding a position and performing duties important to the public peace and safety, is a defendant, it can seldom be expedient to resort to this provisional remedy. It is not at all probable that he will not render himself amenable to any process which may be issued to enforce the judgment that may be rendered against him; and the public interests require that his duties may not, without very stringent reasons, be hindered or interrupted.

For these reasons, except in aggravated cases, if an application for an order of arrest, under like circumstances, were to be now made for the first time, I should deem it my duty to refuse it; but as this is an application to set aside an order of arrest heretofore granted, I do not deem myself at liberty to set it aside on grounds of mere expediency. These are considerations to be addressed to the judge to whom the application is first made, and if he deems it proper to grant it, no other judge should interfere, except to reduce the amount of bail where the circumstances warrant the court in concluding that the amount in which the defendant was ordered to be held to bail was too large.

Anderson *v.* Manufacturers' Bank.

The amount of bail required from the patrolmen should be reduced to \$250 in each case; the order of arrest against Kennedy and Davis being set aside in each case.

ANDERSON *v.* MANUFACTURERS' BANK.

Supreme Court, First District; General Term, May, 1862.

REMOVAL OF CAUSE INTO U. S. CIRCUIT COURT.

An action to recover damages, for failing properly to present and protest a promissory note, is an action brought to recover on a chose in action, within the meaning of the Act of Congress of September 24, 1789,—which provides for the removal of causes from the State to the Federal courts, except where the action is to recover the contents of any promissory note or other chose in action. Where the right of the defendant to remove a case into the U. S. Circuit Court is extremely doubtful, the State court should not exercise its power of removal. Thus, where the action was by an assignee of the cause of action, suing in his own name, as required by the practice in the State court, and the assignor, whose name must, if the cause were transferred to the United States court, be substituted as plaintiff, was a citizen of the same State as the defendant;—*Held*, that the motion to remove should be denied.

Appeal from an order denying defendant's motion to remove the cause into the U. S. Circuit Court.

This action was brought by John S. Anderson against the Manufacturers' Bank, to recover \$633.33 damages, for not properly presenting and protesting a promissory note. The plaintiff was a citizen of New York; the defendants were a corporation created by and doing business in Connecticut. The claim was assigned to the plaintiff by Isaiah M. Colburn. The defendants entered their appearance in this court, and, at the same time, filed a petition for the removal of the cause into the Circuit Court of the United States for the Southern District of New York, and offered a bond, with sureties, duly executed and approved, for entering in the Circuit Court, and copies of the process against them, and for their appearance, &c.; and thereupon, an order was made requiring plaintiff to show cause why

the cause should not be removed. At the hearing of the motion, the plaintiff showed by affidavit that Colburn, who assigned the claim in suit to plaintiff, was a resident in and citizen of Connecticut. An order was made by Mr. Justice Barnard, denying the motion, with ten dollars costs, from which defendants appealed.

Alfred Roe, for the appellant.—I. The defendants were entitled to the order for which they asked. (1 *U. S. Stat. at Large*, 79, § 12; *Gordon v. Longest*, 16 *Pet.*, 97; *Kanouse v. Martin*, 15 *How.*, 198; *Green v. Custard*, 23 *Id.*, 484.) Defendant is a citizen and resident of Connecticut, within the meaning and intent of the act. (*Louisville, &c., R. R. Co. v. Letson*, 2 *How.*, 497; *Covington Drawbridge Co. v. Shepherd*, 20 *Id.*, 227.)

II. The fact that Colburn, who assigned the claim in suit to the plaintiff, is also a citizen and resident of the State of Connecticut, does not sustain the objection to the motion. 1. The provisions of that section do not include or apply to this action. (*Bean v. Smith*, 2 *Mason C. C.*, 252.) 2. Section 12 of the act of Congress gives to defendants the absolute right to remove the action, and section 11 is not applicable to, and cannot control the case. (*Green v. Custard*, 23 *How.*, 484.) 3. The objection of want of jurisdiction in the U. S. Circuit Court can be taken only by special plea; and the defendants would not be permitted so to plead, after having voluntarily removed the action into that court. (*Bailey v. Dozier*, 6 *How.*, 23; *Evans v. McGie*, 11 *Pet.*, 80.) 4. But whatever may be the consequences of removing the cause, the defendants are entitled to the order, by the express provisions of section 12.

III. The alleged cause of action arose in Connecticut, between citizens and residents of that State, and the controversy should properly be there determined. The plaintiff may fairly be presumed to have taken the assignment for the purpose of bringing action in New York, and is not entitled to any special favor to enable him to maintain the action.

Anthony R. Dyett, for the respondent.—I. The act of Congress does not apply to this case, because by the same statute, the plaintiff's assignor being a citizen of Connecticut, the United

Anderson *a.* Manufacturers' Bank.

States court would have no jurisdiction of this action if removed, the plaintiff being an assignee of a chose in action, upon which the assignor could not maintain the suit. (*Dunlop's Dig.*, 45.) The case of *Greene a. Custard*, has no application. 1. The original suit when removed, was one in which the U. S. court in its then shape, had jurisdiction. 2. No objection was taken to its removal at the time of removal. 3. The plaintiff amended his pleading after the removal, by showing a cause of action within the proviso of the 11th section. 4. The court really decided that an amendment of the pleadings could not be made so as to oust the court of jurisdiction, after it had acquired it. 5. It was not a case like this, a case in which it appeared on the face of the declaration, that the plaintiff could not sue in his own name at all under any circumstances, in the United States Circuit Court.

II. The Circuit Court of the United States would have no jurisdiction of the action as it stands, because that court will not, in actions at law, recognize assignees of choses in action, or entertain suits in their names. (*Suydam a. Ewing*, 2 *Blatchford U. S.*, 359.) The case of *Bean a. Smith* (2 *Mason C. C.*, 252) does not decide that this action is not brought by an assignee of a chose in action.

III. The defendant is a corporation, an artificial person, and is not a citizen of the State of Connecticut; and the United States court would not have jurisdiction of the action if removed for that cause. (*The Dred Scott Case.*)

IV. The point that the defendant could not plead to the jurisdiction after removing the cause is not well taken. *Bailey a. Dozier* (6 *How.*, 23) and *Evans a. McGie* (11 *Pet.*, 80), neither decide the point to establish which they are cited. 1. Both came up on the record by writ of error, and the court held, that, on the record, a plea in abatement to the jurisdiction was waived by a plea in bar. 2. In both cases the court held, that in the particular case the court had jurisdiction. 3. In neither case did the court hold, that defendant must plead in abatement to take advantage of jurisdiction of the action. We say, when this case is removed, if the removal be a right,—and it certainly is, if the case be one for removal—it is equally the defendant's right to plead either in abatement or bar.

V. The 11th and 12th sections of the act in question must be

construed reasonably, and so as to harmonize. The fair construction of section 12 is, that where an action is commenced in a State court which might have been commenced in the United States court by section 11, the defendant might demand its removal.

BY THE COURT.*—INGRAHAM, P. J.—This action, if brought between the original parties, would not have been between citizens of different States, and could not have been removed into the United States court. Under the laws of this State, the assignee of a claim must sue in his own name in the courts of this State.

If such an action was removed into the United States courts the plaintiff could not maintain the action there, and it would be a good defence to the action that it was so brought.

Any change of parties, then, by allowing the name of the original party in interest to be substituted, would deprive that court of jurisdiction, because the action then would be between citizens of the same State.

The cause of action here, we think, comes within the proviso (*Act of 1789*, § 11 ; 1 *Stat. at L.*, 78), being to recover a chose in action. The words are, "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee," unless suit might have been prosecuted in such court if no assignment had been made.

The whole statute is to be construed together so far as it relates to this subject; and when the effect of the removal would be to deprive the plaintiff of any right to maintain the action in the courts of the United States, the statute should not be so construed as to direct the removal, if it will admit of any other interpretation. At any rate, where the right of the defendant to remove the case is so doubtful as it is in the present case, the State court should not exercise the power.

We think the order appealed from should be affirmed.

Order affirmed.

* Present, INGRAHAM, P. J., ROSEKRANS and LEONARD, JJ.

Soutter *a.* Mather

SOUTTER *a.* MATHER.*Supreme Court, First District; At Chambers, November, 1862.*

VERIFICATION BY ATTORNEY.

In all cases of verification by the attorney, he must state his knowledge or grounds of belief.

Motion to vacate a judgment.

This action was brought by James T. Soutter against John C. Mather, as maker, and Richard Schell, as indorser, of a promissory note for eleven hundred dollars. The verification of the complaint was as follows :

[VENUE.] Jesse W. Benedict, being duly sworn, says, that he is one of the firm of Benedict & Boardman, the attorneys for the plaintiff in this action, that the foregoing complaint is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true. Deponent further says, that this action is founded upon a written instrument for the payment of money only ; namely, a promissory note, and such instrument is in the possession of deponent's said firm, as attorneys for the plaintiff.

[JURAT.]

[SIGNATURE.]

The defendant Mather answered the complaint. His answer was verified as follows :

[VENUE.] Alexander Spaulding, being duly sworn, says, that he is one of the attorneys for the defendant Mather in this action, and that he has read the foregoing answer, and knows the contents thereof, and that the same is true according to this deponent's belief ; that the reason why he believes the same to be true is, because the said defendant Mather told him so.

[JURAT.]

[SIGNATURE.]

The plaintiff's attorneys returned the answer as not sufficient, ly verified. The defendants' attorneys reserved the answer,

Wheeler *a.* Chesley.

calling plaintiff's attention to the fact that they claimed a right to serve an unverified answer, on the ground of defective verification of the complaint. Plaintiff entered judgment by default against Mather, as for want of an answer, and issued execution, which defendant Mather moved to vacate.

Torrance & Spaulding, for the motion.

Benedict & Boardman, opposed.

BARNARD, J.—In *Stannard a. Mattice* (7 *How. Pr.*, 4), *Treadwell a. Fassett* (10 *Ib.*, 184), *Meads a. Gleason* (13 *Ib.*, 309), *Boston Locomotive Works a. Wright* (15 *Ib.*, 253), it is laid down, that in all cases of verification by an attorney, he must state his knowledge or grounds of belief.

The cases of *Meade a. Gleason* and *Treadwell a. Fassett*, in which the court held the verifications defective, were actions on promissory notes, the verifications were by attorney in substantially the same form as the verification to the complaint in this action.

As these decisions were rendered at special terms in other districts, I should not feel bound to follow them if I thought them erroneous; but I think the construction given by these decisions to the section of the Code under consideration correct.

Motion granted, with \$10 costs.

WHEELER *a.* CHESLEY.

Supreme Court, First District; At Chambers, Sept., 1862.

VERIFICATION BY ATTORNEY.

An attorney having possession of a written instrument for the payment of money only, on which action is brought, may verify the complaint, whether the plaintiff be within the same county or not.

The possession of the instrument with information derived from the plaintiff, are sufficient grounds of knowledge and sources of belief.

Motion to set aside judgment.

Wheeler *v.* Chesley.

This was an action by George W. Wheeler against William H. Chesley, upon an acceptance for \$240. The plaintiff's complaint was verified as follows :

[VENUE.]—F. C. Bliss, of the city of New York, being duly sworn, says, that he is the attorney for the plaintiff in the above action, that the foregoing complaint is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says, that the reason why this verification is not made by the plaintiff, is that the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of deponent, and that his knowledge is derived from said instrument and from information received by this deponent from the said plaintiff, and that the grounds of deponent's belief are the statements of the plaintiff to deponent.

[JURAT.]

[SIGNATURE.]

The defendant served an unverified answer, which the plaintiff returned, and entered judgment. The defendant moved to set this judgment aside.

Charles A. Fowler, for the motion.

Francis C. Bliss, opposed.

BARNARD, J.—The weight of authority is to the effect that an attorney, having possession of the written instrument for payment of money only, on which the action is brought, may verify the complaint, whether he and the plaintiff be within the same county or not ; and that the fact that the action is brought on such an instrument, which is in the attorney's possession, is of itself a sufficient excuse or reason for the attorney verifying the pleading.

The cases, however, are not quite so uniform as to whether it is necessary for the attorney in such cases to insert in the ordinary verification used when a party verifies, in addition to a statement that the action is founded on a written instrument for the payment of money only, and that such instrument is in the deponent's possession, the further statement of the grounds of the knowledge or of the belief of the affiant in the allegations of the complaint. I am, however, of opinion that said further

Low *a.* Graydon.

statement is necessary, and have so held in the case of *Soutter a. Mather* (*Ante*, 440).

In *Treadwell a. Fassett* (10 *How. Pr.*, 184), the judge suggests (but does not decide, as the point did not arise for decision), that the sufficiency of the attorney's knowledge, or the grounds of his belief, in each particular case, is a question for the court to determine. Assuming this suggestion to be correct, I think the grounds of belief set forth in this verification sufficient; it was distinctly so held in *Dixwell a. Wordsworth* (2 *Code R.*, 1). In all cases of actions on written statements for the payment of money only, the very slightest grounds of belief will in my judgment be sufficient.

Motion denied, with \$10 costs; with leave to defendant, upon payment of said costs, to move within 20 days after service of this order, to have the judgment opened on the merits, and he be let in to defend.

LOW *a.* GRAYDON.

Supreme Court, First District; At Chambers, September, 1862.
Again, At Chambers, October, 1862.

MOTION FOR DISCOVERY.—SUBPÆNA DUCES TECUM.—SUFFICIENT DESCRIPTION OF DOCUMENTS.—IRREGULARITY.—WAIVER.—AMENDED COMPLAINT.—TIME TO ANSWER.—SUBSTANTIAL RIGHT.

The fact that papers, sought to be discovered preparatory to trial, may be procured by subpœna *duces tecum*, served upon the adverse party, is not a conclusive answer to an application for an order for their discovery. But if the court see that obtaining the proof in that way is as practicable as by a discovery, the motion will be denied.

On motion for discovery, in an action against an assignor, his assignee, and preferred creditors, to set aside the assignment, there is a presumption that such creditors have possession of the notes, to secure payment of which they are preferred, and which are shown to have been delivered to them.

On motion for discovery, the applicant is not required or expected to give an accurate description of the documents sought. The description need only be sufficiently precise to enable the party who is called on to produce, to know what is required.

Low a. Graydon.

No application to set aside proceedings for irregularity merely will be allowed, unless made within a reasonable time ; nor where the party applying has taken a fresh step, after knowledge of the irregularity.

But the right to put in an answer to an amended complaint, is substantial, and a waiver of it should not be implied.

Where the defendant, after service of an amended complaint, under an order allowing him to elect to let his answer stand, or to serve a new answer, had suffered the trial (which was brought on before the time for him to elect had passed) to proceed on the issues raised by his first answer ;—*Held*, that he did not thereby waive his right to serve a new answer.

I. *September*, 1862.—Motion for discovery.

Three actions against William Graydon and others, defendants, were brought: one by James Low and others; one by Joannes Gourd and others; and one by Edwin Hoyt and others, creditors, to set aside an assignment executed by Graydon, McCreery & Co., to John C. Martin and John W. Graydon; also, to set aside certain transfers of bills receivable by the same firm to Samuel Graydon and Mrs. Mary A. Graydon. The plaintiffs applied for a discovery, under circumstances which are sufficiently stated in the opinion.

Martin & Smith, for the plaintiffs.

Man & Parsons, for the defendants.

BARNARD, J.—A discovery, whether under the Revised Statutes or the Code, can be compelled only as against one party to an action in favor of the other, and even in that case the party against whom the order is made must have possession or control over the thing to be discovered.

As every party can now be subpoenaed *duces tecum*, and examined as a witness at the instance of the opposite party, it follows that if that fact be a conclusive answer to a motion for discovery, the enactments relating to discovery are virtually repealed, except so far as the discovery may be necessary to enable either party to prepare a pleading.

I think the court is not at liberty to adopt a principle that leads to such a result, in view of the fact that the self-same act which introduces the system of allowing a party to be examined as a witness by the adverse party, also contains a provision for a discovery.

Still the fact that the proof may be obtained by a subpoena *duces tecum* is entitled to some consideration, and if the court see that the obtaining the proof in that way will subserve the purpose of the moving party as well as a discovery, the motion will be denied. In the present case, however, it seems to me that the discovery asked for, is necessary for the proper conduct of the action.

Another objection raised is, that it is not shown in whose possession the documents are. As to one set of notes, it is shown that they were delivered to Thomas A. McCreery, one of the defendants; the presumption is that he still has them. As to the other set, Samuel Graydon, one of the defendants, is preferred for them; it must be assumed that he claims to own them, and has them in his possession.

Another objection raised is, that the documents are not sufficiently specified in the moving papers; and in this connection it is urged that to make the discovery effective, a statement of the defendant would be required to show that the notes discovered are those required, and that unless they are specified it cannot be known that they satisfy the order. These objections would apply to every case where a discovery is necessary. If a party can give so perfect a description of a document, as that by mere inspection of the one produced it can be seen to be the one desired, he surely could not require an inspection. The description which the party is enabled to give, must of course vary in its minuteness according to his means of knowledge and his memory. It is sufficient if the party gives the best description he is able, and that the court can see that such description is sufficient to enable the party who is called on to produce, to know what he is required to produce. If the party under the order produces certain documents, he must, of course, do so in such manner as to be a compliance with the order; and if it is necessary to accompany the documents with a statement in order to make a perfect compliance, such statement must be made.

In this case, I see no difficulty in the defendants knowing exactly what to produce. It may be that from the plaintiff being unable to give a better description, the defendants can evade the order, either by producing a less number of notes, or different notes,—that, however, is the plaintiff's misfortune. I think he is entitled to assume that defendants will not seek any

Low a. Graydon.

evasion; and assuming that to be the case, he will obtain all the benefit of an inspection which he desires.

This application cannot be styled a mere fishing experiment. It stands admitted that Samuel Graydon, with funds of the firm of Graydon, McCreery & Co., purchased the notes of that firm, after its suspension, at rates from 37 to 40 cents on the dollar, and delivered some at least of the notes so purchased to Thomas A. McCreery. It also stands admitted that the same Samuel Graydon is preferred for \$86,675, alleged to be due him on promissory notes of the firm held by him.

As to the notes delivered by Samuel Graydon to Thomas A. McCreery, he being a partner of the firm of Graydon, McCreery & Co., the notes are in the joint possession and under the control of them all, and therefore the order as to those notes will extend to all the members of that firm; the order as to the other notes is to go against Samuel Graydon alone.

Ordered, that defendants, William Graydon, James Graydon, Thomas A. McCreery, William H. Scott, and George A. Seely, within two days after service on their attorney of the order, deposit with the clerk of this court, and continue on such deposit for ten days, all the bills payable of the firm of Graydon, McCreery & Co., which were delivered to Thomas A. McCreery by Samuel Graydon on May 4th, 1861, together with the account or memorandum of the said paper and of the moneys with which the same were purchased, delivered by said Samuel Graydon to said Thomas A. McCreery, so that plaintiff may inspect the same and take copies of the same.

And that Samuel Graydon make and continue in like manner and for like purpose, deposit of all notes for which he is preferred in the assignment of the firm of Graydon, McCreery & Co., to John W. Gray and John C. Martin.

Let the order be settled on one day's notice: the order should declare the consequences of an omission to comply with its directions, pursuant to Rule 16. Application granted.

II. *October, 1862.*—Motion to strike out answers to amended complaints.

In the same causes in April, 1862, a motion made by the

plaintiffs for leave to amend their complaints was granted, with an option to defendants to let their answers stand as answers to the amended complaints, or to serve new answers within twenty days. About the middle of August, plaintiffs paid \$35 costs as a condition prescribed by the order, and served amended complaints. On the 19th of August, the trial of the action commenced before the referee previously appointed, and was continued during several days until September 5th. On the 19th of August a copy of the pleadings, consisting of the amended complaints and original answers, were handed to the referee, and portions read to him in presence of defendants' counsel. On August 28th, plaintiffs' counsel read to the referee an admission contained in the original answer, and by means thereof had certain schedules received and read in evidence. On the same day and after the above, defendants moved before the referee to amend their original answer in order to strike out the admission,—the motion was denied. On September 4th, plaintiffs intimated their intention of resting on the following day. On September 5th, amended answers were served by the defendants which plaintiffs returned, and made the present motion to strike out, on the ground that defendants had elected not to answer the amended complaints.

Martin & Smith, for the motion.—I. The defendants have elected not to serve new answers by—1. Going to trial under the amended complaints and their original answers. 2. Moving to amend the latter. 3. Allowing plaintiffs to examine all their witnesses and conclude their case except as to the absent witnesses.

II.—If the service of the amended complaints was irregular, defendant waived the irregularity (*Grah. Pr.*, 712; *Exp. Crosby*, 8 *Cow.*, 119; *Georgia Lumber Co. a. Strong*, 3 *How. Pr.*, 246; *Myers a. Overton*, 4 *E. D. Smith*, 428; *Ranson a. City of New York*, 20 *How. U. S.*, 581; *Dale a. Radcliffe*, 25 *Barb.*, 333.) Defendants were not entitled to twenty days in which to elect. (*Sabin a. Johnson*, 7 *Cow.*, 421.)

III.—Where, as in this case, a party has full knowledge of an order and of its terms, and with that knowledge receives the benefit of the order, he should not be permitted to act as though he had no knowledge of it; more especially where such action

Low *a.* Graydon.

on his part will be attended with unjust and injurious consequences to his opponent, thus a party cannot appeal after recovering the costs of an order. (4 *Abbotts' Pr.*, 468.)

Man & Parsons, opposed.

CLERKE, J.—The defendants had twenty days after the service of the amended complaint, to answer in these cases. This was a positive right, which nothing but an express relinquishment of it could waive. No doubt, there are many acts in the progress of an action, which amount to a waiver of what a party may do in opposition to his adversary. An appearance and pleading to the merits is a waiver of defects in the writ and service; an appearance and pleading after a discontinuance is a waiver of the discontinuance (*Harley v. Real Estate Bank*, 4 *Pike*, 598; *Elliott v. State Bank*, *Ib.*, 437); so going to trial without objection is a waiver of a discontinuance, occurring in consequence of the plaintiffs not taking proper steps to continue the action.

But all these are instances where a party could avail himself of some defect in his adversary's proceedings, and, in such cases, the rule has always been substantially that no application to set aside proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity. By taking this fresh step, he waives a mere technical objection, and speaks as emphatically as if he expressed himself directly in words. The objection does not affect the merits, is not essential to justice, and the acts are as unmistakable and expressive as words. But, in the present case, the right alleged to have been waived is not a right to a technical objection, but a right to assert completely and effectively his defence; and no injury, that I can see, is done to his opponent by appearing at the trial before the referee, and allowing the plaintiff to examine his witnesses before the time for putting in his amended answer expires. In all courts the right to put in a defence is so vital and essential, that the waiver of it should never be implied. If the amended answer changes the issues, or affects them in any way, the referee, of course, will allow the plaintiff to present further evidence to meet the altered aspect of the case.

The motion should be denied, with \$5 costs in each case.

SHIPMAN & SHAFER.

Supreme Court, First District; General Term, May, 1862.

ARREST.—FIDUCIARY CAPACITY.—RECEIVING DEBTOR'S NOTE.

Irregularities not referred to in the papers upon which a motion is made at special term, are not available on appeal from the order made thereon.

The fact that a creditor has accepted the promissory note of his debtor for money received in a fiduciary capacity, is no bar, after the dishonor of the note, to an arrest in an action on the original indebtedness, the plaintiff being ready to return the note.*

* In the case of *MALLORY & LEACH* (*Supreme Court, Fourth District; Special Term, June, 1862*), it was held that the recovery of a judgment in an action for fraud merges and extinguishes the original ground of action. And this rule applies as well to a foreign as to a domestic judgment; and an action upon such judgment is an action upon contract, and not for fraud, so that in such action the defendant cannot be arrested under subd. 1 of section 179 of the Code.

The case came before the court on a motion to vacate an order of arrest.

The action was on a judgment which plaintiff had recovered in another State in an action of tort for fraud.

BOCKES, J.—On the 3d of February, 1862, the plaintiff recovered a judgment against the defendant in the State of Vermont, in an action on the case for fraud, for \$1,134.29 for damages and costs. Thereupon he commenced an action in this State, on the judgment, and obtained an order of arrest against the defendant, under which he was held to bail. The affidavit on which the order was granted states the recovery of the judgment in Vermont, for fraud, and that the defendant is a non-resident of this State. It is further stated, that "the cause of action now existing in favor of said plaintiff against said Leach, does not arise upon contract, but upon the judgment so obtained in Vermont as aforesaid, and the facts adjudicated by said judgment." A motion is now made to vacate the order of arrest.

It is insisted that the order is not authorized by section 179 of the Code of Procedure. This section contains five subdivisions, stating in what cases and under what circumstances the defendant may be arrested; but it is unnecessary to notice the second, third, and fifth, for the reason that the order is admittedly unsupported, unless authorized either by the first or fourth subdivision of that section.

The first subdivision provides for an arrest of the defendant in an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the State, &c. It is shown here that the defendant is not a resident of the State; and the question under this subdivision is, whether this action on the judgment is to be deemed "an action for the recovery of damages on a cause of action not arising out of contract."

The action is on the judgment. The affidavit, it is true, states in terms that

*Distinguishes
7 Daly 174, 175*

*Hollo
13 Bank
56.*

Shipman *a. Shafer*.

Where a debtor who had received money in a fiduciary capacity, gave the creditor his check for it, which was protested for non-payment;—*Held*, that it was no objection to an order of arrest against the debtor in an action to recover the money, that the complaint demanded the costs of protest in addition to the amount of the check, the costs of protest not being claimed as a separate cause of action.

the cause of action does not arise upon contract, but it adds, that the action is "upon the judgment so obtained in Vermont as aforesaid, and the facts adjudicated by said judgment." Thus the affidavit shows that this action is an action on judgment, and the case must be so treated. Indeed, it must be on judgment, or no cause of action is shown, inasmuch as it could not be maintained on the original ground of action. That is merged in and extinguished by the judgment. (17 *Barb.*, 644; 21 *Wend.*, 341; 4 *N. Y.*, 519; 18 *Id.*, 70; 1 *Hill*, 482.) The terms employed in these cases are "merged" and "extinguished." If a judgment be recovered on a note, no action can afterwards be maintained on it, so long as the judgment remains unreversed and in full force and effect. So of any other cause or ground of action inferior in degree to the judgment. (3 *Duer*, 249; 5 *Hill*, 82.) And it was held in *Besley v. Palmer* (1 *Hill*, 482), that the judgment of a court of a neighboring State is no less effectual in extinguishing the demand on which it was rendered, than the judgment of a court strictly domestic.

If, therefore, the fraud, which was the original cause of action, is merged in the judgment and is extinguished by it, then we must look to the judgment as the cause or ground of the present action. It is, therefore, the judgment which is the cause of action. The party must count on the judgment—on the adjudication of the court. He cannot count on the fraud. It is the adjudication which gives him his right of action, and he recovers on due proof of the judgment. But a judgment is an express contract of record. Blackstone says it is a contract of the highest nature. (2 *Bl. Com.*, 465; *Story on Cont.*, § 2.) So an action on judgment is an action arising on contract. (2 *Sandf.*, 402.) This rests on the principle that the law implies a promise by every one to ratify whatever the law of the land orders or directs him to pay. (3 *Cai.*, 22, 29, 32.)

The plaintiff's attorney very properly treated it as an action on contract, and framed his summons accordingly, by demanding judgment for a specific sum, rather than for relief as in an action for a tort. The old form of action on judgment was in debt, and while the form is abolished the substance remains. In such case the action is to recover a debt—a sum determinate and due. (2 *Hill*, 220.) Thus we find that the action is on contract; and by subd. 1 of section 179, a defendant cannot be arrested except in an action for the recovery of damages on a cause of action not arising out of contract.

Inasmuch as this is a question of personal right, as distinguished from the rights of property, the law must have a strict construction. In order to an arrest under subd. 1, the action must be in tort, as distinguished from an action on contract. This is the plain meaning of the language employed. The action must be for the recovery of damages,—a term inappropriate when applied to the principal recovery in an action of debt; but usual and appropriate when applied to actions in tort.

I am aware that it has been said in some cases, that a judgment was not an agreement between the parties (1 *Cow.*, 316; 16 *Wend.*, 441), still, in law an action on judgment has always been deemed an action on contract in the classification of actions, and those remedies and proceedings adopted which were incident to

Shipman *v.* Shafer.

Appeal from an order denying a motion to vacate an order of arrest.

This action was brought by William M. Shipman against Thomas H. and Isaac C. Shafer, and Charles Underhill, to re-

that class. And if in law even, the action is on contract, an order of arrest therein is unauthorized under subd. 1; for the right to the order, under this subdivision, is made to depend on the nature of the action.

I am referred to *Arthurton v. Dalley* (20 *How. Pr.*, 311), as an authority showing that in an action on judgment a party may go behind the record to the cause of action upon which it was founded, for the purpose of obtaining and upholding an order of arrest. This ruling was quite unnecessary to the case, as it was there held that the suit was based on the original transaction; that the party was not concluded by the judgment, inasmuch as it was a foreign judgment, but had a right to count, and did count, on the original cause of action. Judge Hogeboom says in effect, that it is clear that the plaintiff designed to prosecute upon the original transaction. He adds: "Moreover the foreign judgment is not conclusive between the parties. It must be sued in an action of assumpsit, and at least when sued on by the plaintiff, is open to all equitable defences which the opposite party may interpose. Not being an absolute estoppel upon the defendant, it cannot be so upon the plaintiff; for estoppels must be mutual. Hence there is nothing in the character of the judgment which prevents the party from going back to the original cause of action. It is held, that, as to the foreign judgments, the party has his election either to sue upon the judgment or upon the original cause of action." What the learned judge saw fit further to say on this point was unnecessary to the decision of the case, and wholly *obiter*. It is, too, in direct conflict with the decision in *Goodrich v. Dunbar* (17 *Barb.*, 644), where the question was directly up, and very carefully considered by the court at general term. It was there held, in accordance with my conclusions above expressed, that the judgment, counted on being a judgment of a sister State, not a foreign judgment, merged and extinguished the original cause of action, and thereafter an action could only be sustained on the judgment. Judge Mitchell likened it to an acceptance of a higher security, which would merge the inferior, unless taken as collateral. Hence he held that the action was debt on judgment; that the judgment was the cause of action; and therefore that the ground of action could not be deemed to be for money received in a fiduciary capacity, which, being the original cause of action, was merged in and extinguished by the judgment. It followed, consequently, that the defendant was not liable to arrest in the action on the judgment.

Were the facts in *Arthurton v. Dalley* the same as in *Goodrich v. Dunbar*, I should be compelled to express my judgment in accordance with the decision in the latter case. The reasoning of Judge Mitchell is, to my mind, conclusive, and his argument is fully supported by authority. No allusion is made to this case by the learned judge who wrote the opinion in *Arthurton v. Dalley*, and I think the part of the opinion, which I regard as *obiter*, was written without that careful consideration which usually characterizes the decisions of that able and critical jurist. I think he did not give due force to the fact that the right to arrest under subd. 1 is made to depend on the nature of the action in which a recovery is

Shipman *a. Shafer*.

cover \$57.57, as the net proceeds of certain butter and pork sold by the defendants, on commission for the plaintiff. The defendants, after receiving the proceeds, sent the plaintiff their check, post-dated, for \$51.32, the amount then due. The check was

claimed, rather than on facts and circumstances raising a pre-existing duty or obligation. It seems settled on principle and authority, that a judgment recovered in an action on the case for fraud, merges and extinguishes the original ground of action, and that an action on such judgment is an action on contract. This being so, it is very clear that the defendant cannot be arrested under subd. 1 of section 179, which, like subdivisions 2 and 3, puts the rights to arrest on the nature or kind of action; that is, in order to authorize an arrest under subdivision 1, the action must be for the recovery of damages on a cause of action not arising out of contract. But a suit on judgment is to recover a debt, a fixed and determinate sum, and the cause of action is the judgment, which is a contract of the highest nature; hence it arises out of contract. My conclusion is, that the defendant is not liable to arrest under subd. 1 of section 179.

Secondly.—On the facts stated, is the order of arrest authorized by subd. 4 of § 179? This subdivision authorizes an arrest “when the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, &c.” We have seen that the judgment is the debt or obligation for which the action is brought. It was said in *Merchants' Bank a. Dwight* (13 *How. Pr.*, 366, 370) that where a defendant is sued, in an action on contract to recover a debt, or a sum which he has obligated himself to pay, the Code does not authorize an arrest, because the defendant was guilty of a fraud, in incurring a prior and different obligation to pay the same money. The same view was suggested by Judge Mitchell, in *Goodrich a. Dunbar* (17 *Barb.*, 644). He says: “If the plaintiffs had accepted a bond alone, or a bond and mortgage, for their debt, they could not have sued for the original cause of action, nor held the defendant to bail.” The decision in *Alliance Ins. Co. a. Cleveland* (14 *How. Pr.*, 408), is to the same effect. In that case, the defendant was liable to arrest for money received in a fiduciary capacity. For such money, the plaintiff took his check and acceptance. The court held that this had the effect to change the character of the plaintiff's claim. Judge Harris remarked, that the tortious character of the transaction was merged in the new contract between the parties, and that the defendant ceased to be liable to imprisonment.

It is suggested that in the cases above cited, the change of the claim from tort to contract was voluntary, and that the recovery of judgment would not, for that reason, produce the same consequences. But it was held, in *Goodrich a. Dunbar* (17 *Barb.*, 644; see on page 647), that the obtaining of a judgment on the original cause of action was as much a voluntary act, as regards the plaintiff, as the acceptance of a bond or note, and consequently was equivalent, in its legal effect, upon the right to arrest, to the taking and accepting a contract security therefor. If this be so, the defendant cannot be arrested under subd. 4; for in this view, there was no fraud in contracting the debt or incurring the obligation for which the action is brought. The authorities cited seem very conclusive on this point, and are firmly based on principle.

But it is insisted, that even if this were an action on the case for fraud, then that it would not fall within the purview of subd. 4; that such subdivision does

Shipman v. Shater.

protested at maturity, and, subsequently, plaintiff took defendants' note at three months, for \$57.57, for the amount of the check, and eighty-one cents expense of protest, with interest. This note was dishonored at maturity, and the plaintiff brought

not contemplate a case in which fraud constitutes the gist of the action. On the authorities, I must so hold. The case of *Crandall v. Bryan* (15 *How. Pr.*, 48), is the other way; but that is overruled by *McGovern v. Payn* (32 *Barb.*, 83), which is a general-term decision. To the same effect is the decision in *Smith v. Corbiere* (3 *Bow.*, 634). Subd. 4 is very nearly a literal transcript from the Non-imprisonment Act of 1831 (subd. 4 of act of 1831). It was originally drawn with a view to its application to actions on contract only, and was evidently introduced into the Code with the same design.

It was remarked on argument, that this construction and application of subd. 4 would raise a discrimination in favor of actions for fraud, over many others of infinitely less culpability, in which arrests were permitted. This suggestion struck me as one of much force; still, it must not be allowed to prevail against the obvious spirit and clear purport of the statute. Exemption from imprisonment is now the rule, and cases in which arrests are permitted are exceptional. It will be found, on examination, that the other subdivisions of § 179 (other than subd. 4) were intended to cover all actions not arising out of contract, in which it was deemed proper to permit the arrest of parties—leaving subd. 4 to have sole application to actions on contract, according to its original purpose in the Non-imprisonment Act of 1831. Subd. 1 embraces actions for fraud, among the others therein specified. Under this subdivision, a defendant in an action on the case for fraud may be arrested, if it be shown that he is not a resident of the State, or that he is about to remove therefrom. True, it is unnecessary to show that the defendant is a non-resident or that he is about to depart the State, in case the action be for an injury to person or character, or for injuring or wrongfully taking, detaining, or converting property. In those cases, the defendant may be arrested as a matter of course, on proof by affidavit of the cause of action simply. Why the Legislature discriminated in favor of actions for fraud, and made them favorites in law, to some extent, over actions for assault and battery, slander, libel, trespass, trover, and many others mentioned in subd. 2, is not obvious. But so it is written. Thus we find that a defendant, in an action for fraud, may be arrested under subd. 1, in case it be shown that he is not a resident of the State, or is about to remove therefrom. If there had been an intention to authorize an arrest in all cases where fraud was the gist of action, it doubtless would have been so expressed in this subdivision, where the subject of arrest in that class of cases was considered. Such intention would not have been left, I think, to be deduced by construction under another subdivision, which, it must be admitted, has general if not exclusive application to an entirely different class of actions. I am entirely satisfied that an order of arrest is not authorized by subd. 4, in an action on the case for fraud. Section 4 has reference to actions on contract, in which the contract is the gist of action, and fraud in contracting the debt, or incurring the obligation, is the ground of arrest. As was held in *McGovern v. Payn*, the section obviously contemplates that the debt or obligation should be of that character, that the suit might be brought on it even if unaccompanied by fraud in contracting it. In no view of the case can the order of arrest be sustained.

Shipman *v.* Shafer.

the present action, and procured an order of arrest, under which two of the defendants were arrested. Their motion to vacate the order of arrest was denied by Mr. Justice Barnard, and they appealed.

Nathaniel Niles, for the appellants.—I. The order of arrest is a nullity, for irregularities in the jurat of the affidavit on which it was granted, and in the acknowledgment of the undertaking.

My conclusions in this case, briefly stated, are these: that the order of arrest cannot be upheld under subd. 1, for the reason that the action is on the judgment; hence, in law, is an action on contract; nor can it be upheld under subd. 4, inasmuch as that subdivision is applicable only to actions on contracts induced by fraud. I have arrived at these conclusions in this case, against my inclination and wishes, and they are contrary to the impressions entertained by me on the hearing of the motion. But they seem to be the necessary deductions from well-settled rules and principles of law. I cannot refrain from expressing my regret that the law will not permit the enforcement of the plaintiff's demand, by an application of the severest remedies ever adopted in civil actions. But the law must be observed, and if, on pursuing the remedies it affords, it prove less effectual than we could wish in a particular case, still it can be administered only in the way provided by the sovereign power; and if no extraordinary remedies are given to the party, he must be confined to those which are clearly sanctioned and ordinarily pursued.

The motion to vacate the order of arrest must be granted, but it must be without costs of motion.

NOTE.—The rule that a judgment merges the cause of action, is to be taken with some qualification. Several of the cases cited in the foregoing case turn on the effect of a judgment against one of several joint-debtors; but where the judgment is coextensive, as to parties, with the original cause of action, there are not wanting authorities that a judgment without satisfaction is not an extinguishment of a collateral remedy for the same cause of action. [3 East, 258.] Thus a judgment for rent does not preclude the plaintiff from proceeding by distress for the same rent. (*Chipman v. Martin*, 18 *Johns.*, 240.)

So, a judgment confessed does not extinguish the original contract, so long as the judgment remains unsatisfied. [1 Chitt. Pl., 96; 3 East, 251; 2 Leon, 110; Bac. Abr., Tit. Extinguishment (D.), 6 Cranch, 264.] (*Day v. Leal*, 14 *Johns.*, 404; *Butler v. Miller*, 5 *Den.*, 159.)

On this principle, too, it was held in the case of *Thompson v. Minford* (11 *How. Pr.*, 273), that where plaintiff has a good cause of action, but it is uncertain in which of two forms he should sue for it, he may adopt the narrative mode of stating the facts, as was frequently done in a bill in chancery, and sometimes in an action on the case. Thus he may allege a contract on which he seeks to hold the defendant liable, and also a judgment recovered by him thereon in another State, as one cause of action; claiming still only one payment for the whole,—as one only is due.

II. The plaintiff took the defendants' note, after he knew all the facts, and thus he changed the claim from one in the nature of a wrong to one upon contract, and the defendants are not liable to arrest. (*Alliance Ins. Co. a. Cleveland*, 14 *How. Pr.*, 408.)

III. The plaintiff has included the costs of protest in his claim (which is founded on an implied contract to repay) with what he alleges to be a wrong. No order of arrest can be maintained, because if that could be done, the defendants would be required to give bail for a claim not tinged with fraud, by including with it a cause based on fraud. (*Lambert a. Snow*, 9 *Abbotts' Pr.*, 91; *S. C.*, 17 *How. Pr.*, 517.)

Hamilton Odell, for the respondent.—Plaintiff's case being confessed, the only question is: Is it avoided by the fact of the receipt of defendants' note? Clearly not. 1. The note was received in settlement, *in one sense*: that is, by it an open account was liquidated or adjusted. As a payment, discharge, or satisfaction of the original claim, it was not effectual. 2. The note of a debtor, even if taken by express agreement in full payment of a precedent contract debt, will not operate as payment so as to prevent the creditor from suing on the original consideration. (*Cole a. Sackett*, 1 *Hill*, 516; *Edwards on Bills*, text and notes, 192–207; *Nichols a. Michael*, 23 *N. Y.*, 264, 292, 293; *Higby a. N. Y. & Harlem R. R. Co.*, 3 *Bosw.*, 497; *Central City Bank a. Dana*, 32 *Barb.*, 296. See *Moers a. Martens*, 8 *Abbotts' Pr.*, 257.) 3. The only effect of receiving the note was to extend to defendants the time of payment. (*Geller a. Seixas*, 4 *Abbotts' Pr.*, 103.) 4. The note is unpaid, has not been negotiated, and is in plaintiff's possession. 5. The original consideration not being impaired, no remedies accompanying it are lost to the plaintiff.

BY THE COURT.—LEONARD, J.—The first three objections to the validity of the order of arrest, raise only questions of regularity. As none of them are referred to in the papers upon which the motion is founded, they are not available here.

It is alleged, by the defendants, that a note was given to the plaintiff after the cause of action herein accrued, and that the demand thereby lost its fiduciary character.

Shipman *v.* Shafer.

The note as given is the obligation of the debtors only, and was not paid at maturity. It is not disputed that the plaintiff still holds it; and is able to make proof of it at the trial.

In the absence of a special agreement, it is well settled that such a note does not extinguish the original demand. I am wholly unable to see that the plaintiff has received any consideration which can operate to change his rights in respect to the original demand.

It is also stated in the moving affidavits, that the defendants gave a check for this demand of the plaintiff, which was protested, and that the expense of the protest, amounting to 81 cents, is included in the sum for which the plaintiff has obtained his order of arrest, and for which he claims to recover here. If so, it is not stated as an independent cause of action. There is no attempt at the union of a cause of action for which the defendants are not subject to an arrest, with another for which such an order is authorized. The objection arises only from the plaintiff having claimed that there is more money in the defendants' hands than the defendants are willing to acknowledge. The plaintiff and the defendants disagree as to the sum due for the proceeds of the property sold. If the plaintiff has claimed too much, the defendants can meet him at the trial and take their objections, where that question can be properly determined. It is no ground upon which to vacate the arrest.

The question is, also, within the principle, *de minimis non curat lex*.

The order appealed from is affirmed, with costs.

INGRAHAM and ROSEKRANS, JJ., concurred.

People on rel. Mitchell a. Simpson.

28 affirmed
ny. 55

PEOPLE on rel. MITCHELL a. SIMPSON.

Supreme Court, First District; General Term, May, 1862.

SUMMARY PROCEEDINGS.—CERTIORARI.—AFFIDAVIT OF TENANCY.

The fact that summary proceedings for the possession of lands are conducted in a harsh and oppressive manner, and that the tenant may not have had actual notice of them, are not grounds upon which the proceedings can be reversed on certiorari.

An affidavit to found summary proceedings for the possession of land, is not sufficient to give the magistrate jurisdiction, unless it shows the existence of the conventional relation of landlord and tenant, created by agreement or recognized by the acts of the party in possession.*

* The following recent cases further illustrate this rule :

Where a purchaser of real property took possession, pursuant to the contract, but afterwards made default in his payments, whereupon the vendor rescinded the sale, as by the terms of the contract he was entitled to do,—*Held*, that an affidavit showing the relation of the parties, and that the purchaser refused to pay his purchase-money, and yet held over against the vendor's will, was wholly insufficient to give the justice jurisdiction. (*Supreme Ct.*, *People a. Bigelow*, 11 *How. Pr.*, 83.)

Where a lease was given to A., to commence on the termination of a lease of the same premises to B.,—*Held*, that the former could not proceed, under the statute, to dispossess the latter for holding over. The "assigns" referred to in the statute must be such as hold the entire estate of the landlord, in the same term demised to the tenant against whom the proceeding is had. (*N. Y. Com. Pl.*, *Imbert a. Hallock*, 23 *How. Pr.*, 456.)

An agreement to construct a wharf, to be occupied, when finished, by the grantee, at a stipulated rent, accompanied by words of present demise, operates as a lease, within the statute. (*Supreme Ct.*, *People a. Kelsey*, *Ante*, 372.)

Where the evidence showed that the defendants entered on the premises immediately before the expiration of the term of plaintiff's tenant, but the tenant testified that she never gave them permission or right to do so, and that they came in as she was moving out, claiming that the premises were theirs;—*Held*, that the entry must be deemed to have been under a claim of title hostile to the plaintiff, and not under his demise; and that therefore such proceedings could not be maintained. (*N. Y. Com. Pl.*, *Carlisle a. McCall*, 1 *Hill.*, 399.)

But a tenant from year to year, or for one or more years, who holds over, and continues so to do for a year, with assent of his landlord, may be deemed as holding for the year on the former terms; and may be proceeded against at the end of any year of the holding over, without previous notice to quit. (*Supreme Ct.*, *Sp. T.*, *Park a. Castle*, 19 *How. Pr.*, 29.)

When one of two joint lessors of land becomes sole owner of the land and rents, by a conveyance from the other, he may demand the whole rent, and upon re-

People on rel. Mitchell *a.* Simpson.

Where the affidavit showed that the plaintiff was a grantee claiming under the defendant, and that the defendant had not given up possession, and alleged that defendant became a tenant at sufferance of the plaintiff, and that said tenancy was terminated by a notice of one month;—*Held*, that this was not sufficient; for here is no tenancy, but on the contrary, it is shown that the defendant was in reality a grantor yet in possession.

The case of *People a. Ulrich* (2 *Abbotts' Pr.*, 28),—questioned.

Certiorari to review summary proceedings under the statute, to obtain possession of lands.

The defendant, Isabella Simpson, it appeared from the papers,

fusal to pay, may dispossess the tenant, by proceedings in his own name. The statute directs the proceedings to be taken by the landlord, and no person but the one entitled to the possession can obtain the final order from the justice. Where the letting is joint, there can be no division of the rent, as far as the tenant is concerned. A demand of the rent may be by either lessor, and must be of the whole rent, and not of any undivided portion. If both lessors had continued owners, it would have been necessary to have joined both as landlord, but as the interest of one had vested in the other, the former could not be so joined. (*Supreme Ct.*, *Griffin a. Clarke*, 33 *Barb.*, 46.)

Where a mortgagor, in the presence and with the consent of his tenant, relinquished all right and title to the mortgaged premises, and put them in the actual possession and occupation of the mortgagee;—*Held*, that the tenant's term was thereby ended, and the mortgagee was in possession as such and not as lessee; and that the mortgagor could not dispossess him for non-payment of rent. (*Supreme Ct.*, *People a. Culver*, 21 *How. Pr.*, 108.)

Where the affidavit shows that the relation of landlord and tenant was created between the parties by a contract of hiring, if the contract of hiring is not fully stated in the affidavit, the tenant should supply the defect or make some objection to it for this reason. The objection is not available on appeal. (*Supreme Ct.*, *Norsworthy a. Bryan*, 33 *Barb.*, 153.)

Where the affidavit stated that "the estate of L. N., deceased," was landlord of the premises, which statement was not denied by the tenant;—*Held*, that the statement must be deemed to be admitted, and the court, on appeal, could not go behind it, to inquire whether "the estate" was a corporation, or an individual, or an association of several persons. (*Ib.*)

See, also, *Deuel a. Rust* (24 *Barb.*, 438), where an affidavit was held defective for not stating the nature and term of a tenancy, so as to show that the relation of landlord and tenant existed.

As to whether an agreement to work a farm on shares constitutes the relation within the intent of the statute, see *Wright a. Mosher* (16 *How. Pr.*, 454).

The statute is however applicable to the case of a judgment-debtor, or assigns, holding over against a purchaser upon execution sale. (*Ct. of Appeals*, *Spraker a. Cook*, 16 *N. Y.*, 567.)

That the landlord should bring himself clearly within the provisions of the statute, and leave nothing to be inferred. (*Campbell a. Mallory*, 22 *How. Pr.*, 183; *S. P.*, *Miner a. Burling*, 32 *Barb.*, 540; and see 6 *Hill*, 314.)

People on rel. Mitchell a. Simpson.

was assignee of a lease, which had at a previous time belonged to the relator, Miranda Mitchell. The relator, Mitchell, although she had assigned the lease, had not given up possession, and the defendant, Simpson, having become assignee of the term, commenced summary proceedings to obtain possession. The summons was obtained at ten o'clock, and served on some person on the premises, returnable at noon of the same day; and judgment was had by default. The contents of the affidavit upon which the proceedings are founded, are stated in the opinion.

BY THE COURT.*—INGRAHAM, P. J.—This case is submitted to us on certiorari, to review proceedings under the statute for summary proceedings to recover possession of lands, &c. (2 *Rev. Stat.*, 512.)

The return shows the issuing of the summons on the 29th of January, 1862, about 10 A.M., the service of the summons on some person on the premises, whose name is not given, which was returnable at 12 M. of the same day, and judgment taken by default. Harsh and oppressive as this proceeding is in many instances, and uncertain as it is whether in this case any notice ever reached the relator before the order to expel her from the premises was granted, still, under the provisions of the statute, and the decisions which have been made thereon, the relator could have no relief on certiorari, for these causes. That there may be reason, on or about the first of May, for so short a notice, may be conceded; but that such haste is necessary, unless it be for the purposes which appear to have been in view in this case, I can see no good cause for conceding.

We are then left to inquire whether the affidavit on which the justice commenced the proceedings, was sufficient to give him jurisdiction. This affidavit, after stating that the respondent became the owner of the premises for a term of years which had, prior to her title, been assigned by the relator to one of the prior holders of the lease, and that such lease had, by various assignments, been vested in the respondent, adds, "and that said Mitchell became a tenant at sufferance of said Isabella Simpson, and that said tenancy was terminated by a notice of

* Present, INGRAHAM, P. J., LEONARD and BARNARD, JJ.

People on rel. Mitchell a. Simpson.

one month," &c. It contains no allegation of a tenancy, nor any facts showing how any tenancy could exist. On the contrary, the facts set out show that Mitchell could not be a tenant, but was the assignor of the lease, who, after the assignment, had not given up the possession.

This is not a compliance with the statute. It was not intended, and does not provide, for obtaining the possession of lands in any cases except those in which the relation of landlord and tenant exists, and applies to no one but a tenant. The affidavit is to show the facts which authorize the removal of the tenant, before the magistrate is authorized to proceed. No such fact is shown in this affidavit, and there is not even the usual statement that the relator was the tenant of the premises, but merely that she became a tenant at sufferance of the respondent. That the respondent or person making the affidavit was unwilling to make any such affidavit as the statute requires, appears from the alterations made in the original affidavit.

We have been referred to the case of *People a. Ulrich* (2 *Abbotts' Pr.*, 28), to sustain the sufficiency of this affidavit. In that case it is said that there is nothing in the statute requiring the particularity of stating the particular facts establishing the tenancy. The statute does require the affidavit to state the facts which warrant the removal of the occupant. These facts are the tenancy, the non-payment of rent, and, in case of sufferance, the notice to quit. It is quite as necessary to state the tenancy as the notice to quit, and I cannot assent to the doctrine that in these cases the landlord should not be required to show affirmatively that a tenancy does exist between him and the person in possession, before he can be removed.

But it is not necessary in this case to interfere with that decision, and being a decision of the general term it should be binding here. In the present case the affidavit does not go so far. In that case it is stated positively that McGuire was a tenant under the former owner, who conveyed to the relator. In the present case no such allegation is made, but, on the contrary, the affidavit shows that the person sought to be charged as tenant was in reality the owner, and had conveyed her title so that it had vested in the person claiming to be landlord, and adds that the respondent became entitled to the possession of the premises, and that Mitchell became the tenant at sufferance

Coley's Estate.

by reason of such transfers and assignments. If such a statement is sufficient to create a tenancy, it will scarcely be necessary to bring an action to get possession of land from a former owner. It appears to me, that instead of showing a tenancy, the affidavit shows that such relation does not exist. In *Benjamin v. Benjamin* (5 *N. Y.*, 383), McCOUN, J., says: "To entitle a party to this summary remedy, it must appear that the relation is a conventional one, created by agreement, not by mere operation of law. The relation of landlord and tenant does not necessarily exist in many cases where the legal ownership is in one person and the possession in another, although by the express compact of the parties. It can only arise where he who is in possession has, by some act or agreement, recognized the other as his lessor or landlord, and taken upon himself the character of a tenant If any other question than such as related to the tenancy and the holding over, is to be litigated, recourse must be had to an action instead of this proceeding."

The decision referred to in 2 *Abbotts' Pr.*, 28, goes quite far enough, and has opened a door to much oppression in some of these proceedings. I do not feel willing to extend it any further.

The affidavit was defective, and the proceedings must be reversed and restitution ordered.

Order accordingly.

COLEY'S ESTATE.

Surrogate's Court, City and County of New York; Nov., 1862.

ANCILLARY ADMINISTRATION.—FOREIGN EXECUTOR, WHEN NOT
REQUIRED TO ACCOUNT HERE.

An executor appointed in another State in the case of a testator domiciled there, although he may take out ancillary letters in the Surrogates' Courts of this State, to reach assets here, can be compelled to account here, at the instance of a beneficiary under the will, only for such assets as the testator left in this

Coley's Estate.

State, and which were here at the time when the letters ancillary were granted. With respect to all other assets he is to account in the jurisdiction of the principal administration.*

* In the case of *MIDDLEBROOK v. THE MERCHANTS' BANK* (*Supreme Court, First District, Special Term, December, 1862*), it was *Held*, that an executor who has obtained probate and letters in a sister State, where the testator was domiciled and died, and where the executor resides, can dispose of personal assets situated in this State, without taking out letters ancillary here; although such ancillary letters would be necessary to enable him to sue here.

This was an action to compel the bank to allow the transfer of one hundred shares of their stock standing in the name of Robert Middlebrook, deceased, to his son, Louis N. Middlebrook, the plaintiff. The deceased was a resident of Connecticut, and died there, leaving a will by which he gave to the plaintiff a legacy, payable in bank stock, to be selected by the plaintiff and appraised. He appointed three persons, resident in Connecticut, his executors. The executors proved the will in the Probate Court for the district of Bridgeport, Connecticut, letters-testamentary were granted to them, and they proceeded to settle the estate according to the will. The testator held stock in the Merchants' Bank of the city of New York, the defendant in this action, and in five or six other banks in the same city. The plaintiff selected one hundred shares of the stock in defendant's bank as a part of his legacy; the shares were appraised and the executors executed, in Connecticut, a transfer of the shares to the plaintiff, who applied to the bank for leave to transfer them into his own name on the transfer books of the bank. The bank refused to allow the transfer on the ground that the executors had no right to dispose of these shares without first taking out letters-testamentary in this State.

E. Seeley and Wm. Bliss, for plaintiff.

B. W. Bonney and Alfred Roe, for defendants.

CLERKE, J.—The simple question in this case is whether an executor, who has obtained probate and letters-testamentary in a sister State,—the residence of the executor, and where the testator lived and died,—can dispose of his testator's personal property, situated here, without taking out letters ancillary in this State.

It is certain that no person can maintain an action in our courts, as an executor or administrator, without first taking out letters ancillary in this State.

That is, before he seeks the aid of our courts, to enforce any legal right in this State, he must first be invested, recognized, and commissioned, in his representative capacity, by the appropriate jurisdiction here.

But that is very different from saying that he cannot transfer any rights existing in this State,—that he cannot sell any of his testator's estate or release any interest therein without first obtaining letters ancillary here.

In the language of *ASHURST, J.*, in *Smith v. Miles* (1 *T. R.*, 480), "the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession."

The probate is not a mere ceremony, but when passed, the executor does not derive his title under the probate, but under the will. The probate is only evidence of his right, and is necessary to enable him to sue; but he may release, &c., before probate. (See, also, *Valentine v. Jackson*, 9 *Wend.*, 302; *Babcock v. Booth*, 2 *Hill*, 181.) If the executor, then, can before probate dispose of his testator's

Coley's Estate.

There may, however, be exceptions to this rule,—*e. g.*, where the bulk of the estate is within the jurisdiction of ancillary administration, the will is clear, the debts are paid, and it is apparent that no injury could arise.

John J. Townsend, for the legatee.

Alexander W. Bradford, for the executor.

DALY, First Judge of the New York Common Pleas, Acting Surrogate.*—The testator, at the time of his death, was domiciled in Connecticut, and his will was admitted to probate in that State, in August, 1857. Afterwards, in November, 1858, his executor obtained letters ancillary in this court to reach effects in this State. He has been called to account by a legatee resident here, and the executor having filed his account, the legatee insists that there are railroad bonds, stocks in various corporations, and State bonds other than those of the State of Connecticut, not included in the inventory filed here, in respect to which he claims the right to examine the executor, with the view of ascertaining whether any of them, or the proceeds of any of them, have been brought within this jurisdiction since letters were granted here; to which the executor objects, upon the ground that he can be called to account here only for such assets as the testator left in this State, and which were here at the time when the letters ancillary were granted, and that with respect to all other assets, he is to account in the jurisdiction where they are situate, or in the State of Connecticut, where the testator was domiciled at the time of his death, where his will was originally admitted to probate, and where his estate is now in the course of administration.

I think the objection is well taken. Our statute provides that in all cases where persons not inhabitants of this State shall die, leaving assets in the State, and letters-testamentary have been granted by competent authority in any other State of the

property, situated or not in the place where his testator had resided, he certainly can dispose of it after probate, although he cannot enforce the possession of it under a foreign jurisdiction without complying with the preliminary requirements of the laws of that jurisdiction.

The plaintiff, I think, is clearly entitled to judgment.

* During a vacancy in the office of Surrogate, the Hon. Charles P. Daly, the First Judge of the New York Common Pleas, discharged the duties of the office.

Union, that the person so appointed, on producing such letters, shall be entitled to letters of administration, in preference to all other persons. (2 *Rev. Stat.*, 75, § 31; *same stat.*, 3 *Ib.*, 5 ed., 159, § 31.)

The design of this provision was to enable an executor who had obtained letters in another State, to possess himself lawfully of the assets which the testator had left in this State, and for those assets he must account here. If, however, he has, before letters ancillary were granted to him, collected debts in this State, or otherwise previously possessed himself of property which the testator left here, he is not to account here for such assets, but to the jurisdiction where the will was originally admitted to probate, and where the estate is to be generally administered. (*Parsons v. Lyman*, 20 *N. Y.*, 103; 28 *Barb.*, 564; 4 *Bradf.*, 268.)

The object of the legatee in the present case, by the examination which he wishes to institute, is to ascertain not merely what assets were left by the testator in this State, but whether the executor has not, since letters ancillary were granted to him, brought here assets belonging to the estate, with the view of requiring him, if such should be the fact, to account for them here; and this, in my judgment, the legatee cannot do. If they were not collected or realized in this State, by the executor after he took out letters here, he is to account for them in the jurisdiction in which they were situate at the time of the testator's death, or in Connecticut, where the testator's estate is in the course of general administration.

As the term "ancillary" denotes, the administration here is in a certain sense subordinate to the more general administration in Connecticut. "The assets of foreigners," says Story, "are collected under what is called an ancillary administration (because it is subordinate to the original administration), taken out in the country where the assets are locally situate." (*Story's Equity Jurisprudence*, § 583; *Story's Conflict of Laws*, ch. 13, 512-519.) And this term was employed by Chancellor Walworth in *Vroom v. Van Horne* (10 *Paige*, 549), as descriptive of the kind of administration for which provision had been made by our statute. By a principle universally recognized, the interpretation of the testator's will, and the distribution of his estate, is regulated by the *lex domicilii*, and the accounting of

the executor here is to be carried no further than may be necessary to enable our own citizens to secure their claims out of assets situate within our own jurisdiction; after which, and the payment of expenses, the further administration of such assets, it is generally conceded, is to be left to the jurisdiction where the estate is to be finally closed.

If the person calling the executor to account was a resident creditor here, I should feel disposed to go very far in assisting him to ascertain, by a proceeding like this, what portion of the testator's estate was situate here, irrespective of the circumstances under which it came within our jurisdiction; that he might have whatever remedy for the payment of his debt our tribunals could afford him. But a legatee, who is a partaker of the testator's bounty, may very well be remitted to the jurisdiction where the estate is to be generally administered. It has, in several cases, been held that the beneficiary who seeks the payment of a legacy, must resort to the jurisdiction of the State or country where the testator was domiciled at the time of his death, where letters-testamentary were originally granted, and that the payment of it will not be decreed by a foreign tribunal, out of assets situate within its jurisdiction, which are under administration ancillary. (*Selectmen of Boston v. Boyleston*, 2 *Mass.*, 384; 9 *Ib.*, 337; *Fay v. Haven*, 3 *Metc.*, 109, 114; *Jennison v. Hopgood*, 10 *Pick.*, 77.) This is, as a general rule, a correct one, to prevent all possibility of a conflict of jurisdiction to secure the creditors, wherever situate, against losing any part of their claims through a payment to legatees; and generally to prevent the doing of any act on the part of independent jurisdictions which might cause a different result in the disposition of his estate from what the testator intended. As a general rule of comity, it recommends itself by its eminent justice and propriety, but still, like every other rule, it has its exceptions. If the bulk of the testator's estate is within the jurisdiction where administration ancillary has been granted, if there is nothing in the will to indicate the possibility of any question arising under it, and debts have been paid, or the amount of them has been fully ascertained by the ordinary course of procedure in both jurisdictions, and it is apparent to the court that no injury could possibly arise to creditors or legatees by decreeing the payment of a legacy, then there is no reason why the payment of it should

Cook *a.* Kelly.

not be decreed out of assets situate within the jurisdiction where the legatee resides. No rule of comity demands that the legatee in such a case should be turned over to the tribunals of the State or country where the testator was domiciled at the time of his death. Nothing has been laid before me to show that the application of the legatee in the present case presents such an exceptional instance, and I shall, therefore, hold that the executor is not required to account generally here for assets which have been returned by him and included in the inventory which he has filed in Connecticut, but that he is to account for such assets only as may have been collected or realized by him in this State since the letters ancillary were granted to him.

COOK *a.* KELLY.

New York Common Pleas; General Term, November, 1862.

ACKNOWLEDGMENT OF ASSIGNMENT UNDER ACT OF 1860.

Under the act of 1860 (*Laws of 1860*, 594, ch. 348, § 1),—requiring assignments for benefit of creditors to be in writing, and duly *acknowledged* before delivery,—an assignment which is *proved* by a subscribing witness is not effectual. The statute requires that where several debtors make an assignment, each shall join in the acknowledgment, and in verifying an inventory.

Appeal from an order of the special term.

The plaintiff, John Cook, brought this action as assignee of a partnership, under the firm of Cornell & Conly, to enjoin the defendants, John Kelly and others, from disposing of the assigned property, and for further relief. He moved, at special term, for an injunction and receiver, but the motion was denied, and he now appealed. The decision of the motion is reported, 12 *Ante*, 35.

D. & T. McMahon, for the appellants.

G. W. Cotterill and Arthur & Gardiner, for the respondent.

Cook *a.* Kelly.

BY THE COURT.*—BRADY, J.—From the opinion of Judge Hilton, delivered at special term (Cook *a.* Kelly, 12 *Abbotts' Pr.*, 35), in deciding the motion in this case, it appears that the order which he directed to be entered was based upon a fatal defect in the acknowledgment of the assignment. I do not deem it necessary to add any thing to that opinion, so far as relates to any views therein expressed, but to unite to it some suggestions not stated.

The act of 1860 is in derogation of the common law, which did not require that assignments should be either proved or acknowledged. Its provisions require from all the debtors making the assignment an observance of the preliminaries or formulas, not from one of them alone. "Every conveyance made by a debtor or debtors shall be acknowledged." "Every debtor or debtors shall make an inventory." An affidavit shall be made by such debtor or debtors "that the inventory is in all respects true." An assignment for the benefit of creditors must be made by all the parties. (Wetter *a.* Schlieper, 4 *E. D. Smith*, 707; Kelly *a.* Baker, 2 *Hilt.*, 531.)

An acknowledgment by one would not therefore be binding upon the others. In reference to the assignment, he could not act for his associates without authority, and when the statute requires evidence that they all act in concert, that proof must be given. The language of the statute is clear. It requires from the debtors—not one of them—the performance of certain acts, and creates a duty entirely new. Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. (Fisher *a.* Bright, 2 *Cranch*, 358, 399; *Sedgwick on Stat. and Const. Law*, 231; *People a. Utica Ins. Co.*, 15 *Johns.*, 358, 380.) The law requires good faith on the part of the assignors. Their acts in reference to the assigned estate must be free from fraudulent designs; and to secure that, the Legislature may have considered it better to require the co-operation of all the debtors, if the assignment was made by two or more, in all matters relating to such estate. The identity of the copartners is secured by the acknowledgment, and the truthfulness of

* Present, DALY, F. J., BRADY and HILTON, JJ.

Smith *a.* Smith.—Von Schœning *a.* Buchanan.

the inventory is established by the concurrent oaths of all the debtors. It may be said that in case of the absence of some of the partners an assignment would be impossible, although it might be just; and admitting it with all its force, the answer is that the defect must be cured by legislation. When an act of the law-makers declares that several parties shall each do a certain thing, the performance of one is not a compliance. I think the language of the statute plain, and the duty of acknowledging the assignment imperative on all the parties.

The order of the special term in favor of the defendants must be affirmed, with \$10 costs.

SMITH *a.* SMITH.

Supreme Court, First District; General Term, Sept., 1862.

On appeal from the decision in this case at special term (reported *Ante*, 130) to the general term, the order was affirmed by INGRAHAM, CLERKE, and BARNARD, JJ., upon the grounds stated by Mr. Justice Barnard in his decision below.

William R. Stafford, for the appellant.

Ira D. Warren, for the respondent.

VON SCHœNING *a.* BUCHANAN.

New York Superior Court; General Term, May, 1862.

[The following opinion of the chief justice should have been inserted in our report of the case, *Ante*, 185, but was not received at the time that report was published.]

BOSWORTH, Ch. J.—Section 304, subd. 2, of the Code, enacts that “costs shall be allowed, of course, to the plaintiff upon a recovery” (§ 304) “in an action to recover the possession of personal property.” (Subd. 2 of § 304.)

Von Schoening *a.* Buchanan.

So long as this provision continues in force, a defendant cannot have the costs of such an action when the plaintiff recovers therein. The plaintiff has recovered in this action, and the plaintiff is entitled to costs. But subdivision 4 of § 304, contains a provision which affects the question of the amount of costs recoverable, but not the right to costs. That provision is, that the plaintiff shall "recover no more costs than damages" (when his damages are less than \$50), "unless he also recovers property the value of which, with the damages, amounts to fifty dollars." The plaintiff recovered property of the value of \$40, but the jury assessed no damages in his favor.

The Legislature undoubtedly intended to permit a plaintiff to sue for and recover the possession of personal property, even though its value, with the damages for its detention, might not amount to \$50, and even in that case to recover as much costs as damages. And it may be stated as a rule without an exception, that wherever a plaintiff recovers property unjustly detained, he is entitled, as a matter of course, and as a strict legal right, to recover at least nominal damages. But whether he recovers six cents damages and only six cents costs, or recovers no damages and collects no costs, is a matter of only twelve cents consequence so long as he cannot in any event be compelled to pay costs.

The order vacating the judgment is correct. But if the plaintiff desires a judgment of six cents damages and six cents costs, he must apply for leave to amend the verdict so as to give him six cents damages. *Bemus a. Beekman* (3 *Wend.*, 667; and 7 *Cow.*, 29) is an authority that the court may amend the verdict, where the amendment made follows the finding as a necessary legal consequence of such finding. (*Burhans a. Tibbits*, 7 *How. Pr.*, 21.) The order appealed from declares "that the motion to set aside the judgment entered in this action in favor of the defendants and against the plaintiff, . . . be and the same is hereby granted, with seven dollars costs to be paid by defendants to plaintiff's attorney."

If the verdict is to be amended, it should be done at special term on a motion for the purpose. The order appealed from does not purport to touch that question, and the defendant alone appeals from it. On this appeal, all that can regularly be done is to affirm the order, with \$10 costs.

the first of June, 1642, the king's army of about 20,000 men, consisting of English and Scottish troops, marched from London to the town of Nottingham. The king's purpose was to raise the siege of the town, which was held by a small party of Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Edgehill, on the 23rd of August, 1642. The battle of Edgehill was a tactical draw, but it allowed the king's army to retreat to the town of Nottingham without being pursued.

The king's army then moved on to the town of Leicester, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Leicester, on the 22nd of September, 1642. The battle of Leicester was a decisive victory for the king's army, and the town of Leicester was captured. The king's army then moved on to the town of Lincoln, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Lincoln, on the 2nd of October, 1642. The battle of Lincoln was a decisive victory for the king's army, and the town of Lincoln was captured.

The king's army then moved on to the town of York, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of York, on the 1st of November, 1642. The battle of York was a decisive victory for the king's army, and the town of York was captured. The king's army then moved on to the town of London, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of London, on the 1st of December, 1642. The battle of London was a decisive victory for the king's army, and the town of London was captured.

The king's army then moved on to the town of Oxford, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Oxford, on the 1st of January, 1643. The battle of Oxford was a decisive victory for the king's army, and the town of Oxford was captured. The king's army then moved on to the town of Worcester, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Worcester, on the 1st of February, 1643. The battle of Worcester was a decisive victory for the king's army, and the town of Worcester was captured.

The king's army then moved on to the town of Hereford, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Hereford, on the 1st of March, 1643. The battle of Hereford was a decisive victory for the king's army, and the town of Hereford was captured. The king's army then moved on to the town of Gloucester, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Gloucester, on the 1st of April, 1643. The battle of Gloucester was a decisive victory for the king's army, and the town of Gloucester was captured.

The king's army then moved on to the town of Bristol, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Bristol, on the 1st of May, 1643. The battle of Bristol was a decisive victory for the king's army, and the town of Bristol was captured. The king's army then moved on to the town of Exeter, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Exeter, on the 1st of June, 1643. The battle of Exeter was a decisive victory for the king's army, and the town of Exeter was captured.

The king's army then moved on to the town of Plymouth, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Plymouth, on the 1st of July, 1643. The battle of Plymouth was a decisive victory for the king's army, and the town of Plymouth was captured. The king's army then moved on to the town of Dartmouth, which was also held by Parliamentarian forces. The king's army was met by a small force of Parliamentarian troops at the town of Dartmouth, on the 1st of August, 1643. The battle of Dartmouth was a decisive victory for the king's army, and the town of Dartmouth was captured.

D I G E S T
OF
ALL POINTS OF PRACTICE
EMBRACED IN
THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this Volume :

Viz—35 and 36 BARBOUR ; 14 ABBOTTS' PR. R. ; 23 HOWARD'S PR. R., and in the
LAWS OF 1862.

ABATEMENT.

1. Where, pending an action, the cause of action has been transferred by the plaintiff, the action must continue in the name of the original plaintiff, unless the transferee applies to be substituted as plaintiff. [Code, § 121.] *N. Y. Superior Ct., Sp. T.*, 1862, *Emmet v. Bowers*, 23 *How. Pr.*, 300 ; questioning *Shearman v. Coman*, 22 *Ib.*, 517.
2. The death of a sole plaintiff suspends all further proceedings until there is a revival by the personal representatives of the deceased ; so that no step can be taken in the action until it has been continued by the order of the court. *N. Y. Superior Ct., Chambers*, 1862, *Jarvis v. Felch*, *Ante*, 46.

ACCOUNT (ACTION FOR).

LIMITATIONS, 1.

ACKNOWLEDGMENT OF DEEDS.

Appointment of commissioners for European countries, authorized. *Laws of* 1862, 478, ch. 283 ; amending *Laws of* 1858, 498, ch. 308.

ASSIGNMENT FOR BENEFIT OF CREDITORS, 4-6.

AFFIDAVIT.

ACTION.

1. Actions to recover the possession of military property, and the amount of any fine or penalty under the two preceding sections, may be brought, by any officer entitled to the possession of such property, in any court of competent jurisdiction; and such fine or penalty, together with all other fines and penalties prescribed by this act, and by Laws of 1854, ch. 398, shall be paid to the treasurer of the county where the offender may reside, for the benefit of the military fund of the regiment located therein. The possession of any military property, or the amount of a fine or penalty, may be recovered in the same action. Proceedings at law shall not preclude the punishment of any military person in the military courts. *Laws of 1862, 945, ch. 477, § 815.*
2. An action to set aside the proceedings of commissioners of highways, or to restrain them from carrying out an order made by them, whether on the ground that they had no jurisdiction, or that their decision was unjust or irregular, cannot be maintained. [17 Wend., 464; 26 Ib., 132; 14 N. Y., 534; 9 How. Pr., 32.] *Supreme Ct., 1861, Hyatt v. Bates, 35 Barb., 308.*
3. *It seems*, that the English statute (6 Anne, ch. 3; re-enacted, 14 George III.),—which provides that no action, suit, or process shall be had against any person in whose building or on whose estate any fire shall accidentally begin, for any damage thereby,—is in force in this State as part of the common law brought with them by the colonists. *Supreme Ct., 1862, Lansing v. Stone, Ante, 199.*
4. That an action will lie upon the most insignificant claim. *Nellis v. McCarn, 35 Barb., 115.*
5. On a breach of a contract to provide for the plaintiff during life, he is not compelled to resort to an action for specific performance, but may recover damages, not only for his loss up to the time of bringing the action, but for all that he will sustain by the termination of the contract. [8 Barb., 412.] *Supreme Ct., 1862, Dresser v. Dresser, 35 Barb., 573.*

CAUSE OF ACTION, 6; EXECUTORS; RECEIVER, 5; REPLEVIN.

ADJOURNMENT.

JUSTICES' COURTS.

AFFIDAVIT.

1. Any person holding the rank of colonel, or of higher rank, in the New York State volunteers in the service of the United States, and commissioned officers in said service, and who is a counsellor of the Supreme

AMENDMENT.

Court of this State, may administer and certify oath or affirmation of volunteer actually in said service, and out of this State. *Laws of 1862*, 870, ch. 471, § 1.

2. An oath or affirmation, so taken and certified, may be read and used in any place, or before any court, officer, or tribunal in this State, for any purpose, with like force and effect as if taken before any civil officer in this State. *Ib.*, § 2.
3. Commissioners in European countries, appointed by the governor, may administer oaths and affirmations. *Laws of 1862*, 478, ch. 283; amending *Laws of 1858*, 498, ch. 308.

EVIDENCE, 7.

ALIMONY.

Wife, when sued for divorce, not to be allowed alimony, &c., if living in open adultery. *Supreme Ct.*, 1862, *Griffin v. Griffin*, 23 *How. Pr.*, 189; affirming S. C., 21 *Ib.*, 364.

AMENDMENT.

1. Where the defendant, after service of an amended complaint, under an order allowing him to elect to let his answer stand, or to serve a new answer, had suffered the trial (which was brought on before the time for him to elect had passed) to proceed on the issues raised by his first answer;—*Held*, that he did not thereby waive his right to serve a new answer. *Supreme Ct., Chambers*, 1862, *Low v. Graydon*, *Ante*, 443.
2. In an action involving the construction of a will, the court have no power to amend the judgment after it has been entered, by inserting an allowance to certain of the parties, in addition to that given by § 308 of the Code, by way of indemnity to the expenses of the suit. *Supreme Ct., Sp. T.*, 1862, *Hotaling v. Marsh*, *Ante*, 161.
3. The mistakes which may be amended under § 173 of the Code, do not include judicial errors in rendering judgment. *Ib.*
4. The judge or referee, before whom a cause is tried, may allow the pleadings to be amended to any extent, in furtherance of justice, even to permit the setting up of an entirely new defence without costs. *Supreme Ct.*, 1860, *Van Ness v. Bush*, *Ante*, 33.
5. In an action to recover possession of personal property, where the jury find a verdict for the plaintiff, but award no damages for the detention, the court will supply the omission by inserting nominal damages. *N. Y. Superior Ct.*, 1862, *Von Schoening v. Buchanan*, *Ante*, 185; and see 469.
6. Proof that defendant charged plaintiff with having taken articles will

ANSWER.

not sustain the allegations of a complaint that defendant charged plaintiff with having *stolen* the property. But where the judge, in such case, disregards the variance between the words proved and the words stated in the complaint, and sends the case to the jury upon the proofs, upon a proper charge, submitting the question of the meaning and sense of the words used,—*Held*, equivalent to an amendment of the complaint, on the trial substituting the words proved for those alleged in the complaint. [7 Barb., 581; 19 Ib., 371; 20 Ib., 42; 11 N. Y., 287.] *Supreme Ct.*, 1861, *Coleman a. Playsted*, 36 Barb., 26.

7. *It seems*, that a writ of mandamus may be amended after it is returnable. *Supreme Ct., Sp. T.*, 1861, *People a. Baker*, *Ante*, 19.
8. No action shall be abated or dismissed, by reason of plaintiff's proof as to a limited partnership failing to meet the allegations of his pleading, as to the names and number of the partners, if the sign required by the statute was not put up. *Laws of 1862*, 880, ch. 476, § 1; amending 1 *Rev. Stat.*, 765, § 13.

APPEAL, 11, 12.

ANSWER.

1. It is essential to the sufficiency of an answer stating new matter as a defence, that it state facts, which, if true, will bar the action, or so much of it as is attempted to be answered. *N. Y. Superior Ct.*, 1861, *Carter a. Koezley*, *Ante*, 147.
2. Where an answer is susceptible of being construed to contain either of two defences,—one of payment, the other a counter-claim,—the one requiring a reply, and the other not, in order to form an issue thereon, it is to be construed as merely setting up payment. *Supreme Ct.*, 1861, *Bates a. Rosekrans*, 23 *How. Pr.*, 98. Compare *Burrall a. De Groot*, 5 *Duer*, 379.
3. In an action upon a negotiable instrument, an answer that the plaintiff, prior to the commencement of the action, for a good consideration, sold and delivered the note to John Doe, who was the owner and holder of the note at the commencement of the action, is not frivolous. *Supreme Ct.*, 1862, *Smith a. Mead*, *Ante*, 262.
4. In an action to recover possession of real property, the answer averred that at the commencement of the action, defendant was in possession, as assignee, of a lease of a specified date for an unexpired term, by the mayor, &c., of New York, in pursuance of a sale of the premises, by them duly made, on a day named, for the non-payment of a tax duly imposed thereon;—*Held*, insufficient. *N. Y. Superior Ct.*, 1861, *Carter a. Koezley*, *Ante*, 147.

APPEAL.

5. Where defendant, before the action was commenced, had been appointed by the government of the United States, a foreign minister;—*Held*, that an answer setting up that fact was frivolous. *Supreme Ct.*, *Sp. T.*, 1861, *Mechanics' Bank v. Webb*, *Ante*, 72, *note*.

APPEAL.

1. An order of the special term, denying the defendant in a divorce suit alimony or an allowance for expenses of suit, is a matter of discretion, and not reviewable on appeal. [2 *Rev. Stat.*, 148; 2 *Paige*, 621; 3 *Edw.*, 387; 1 *Clarke*, 460; 2 *Barb. Ch.*, 266; *Bish. on Marr. & Di.*, § 581; 22 *How. Pr.*, 177.] *Supreme Ct.*, 1862, *Griffin v. Griffin*, 23 *How. Pr.*, 189; affirming *S. C.*, 21 *Ib.*, 364.
2. The general term will not interfere with an order at special term, appointing a receiver in a case, within the discretion of the court below. *Supreme Ct.*, 1862, *McMahon v. Allen*, *Ante*, 220.
3. An objection which was not raised at the trial, and which, if it had been, might possibly have been obviated, cannot be used as a ground of appeal. *Ct. of Appeals*, 1859, *Stewart v. Smith*, *Ante*, 75. *Supreme Ct.*, 1861, *Fowler v. Clearwater*, 35 *Barb.*, 143.
4. When a particular fact was not a matter of contest nor a ground of objection on the trial, and it was assumed or taken for granted in the conduct of a cause, a court of review should conclude that it was assumed, when satisfied of it from the general scope and tenor of the proceedings. [Reviewing many cases.] *Supreme Ct.*, 1862, *Paige v. Fazackerly*, 36 *Barb.*, 392.
5. Judgment of a referee not reversed upon a question of fact, unless very clearly against evidence. *Supreme Ct.*, 1861, *Sinclair v. Tallmadge*, 35 *Barb.*, 602.
6. That the omission of a judge, before whom an action is tried without a jury, to make any specific findings of fact, is not a ground of appeal. The remedy is by motion at special term. [13 *How. Pr.*, 411.] *Sharp v. Wright*, 35 *Barb.*, 236. To the contrary is *Chamberlain v. Dempsey*, *Ante*, 241.
7. Irregularities not referred to in the papers upon which a motion is made at special term, are not available on appeal from the order made thereon. *Supreme Ct.*, 1862, *Shipman v. Shafer*, *Ante*, 449.
8. An order of a judge in supplementary proceedings, discharging a defendant from an order to show cause why he should not be punished for contempt, is appealable by the relator; for it affects a substantial right to his prejudice. *Supreme Ct.*, 1861, *Livingston v. Swift*, 23 *How. Pr.*, 1.

APPEAL.

9. The allowance of costs to the relator, on awarding a peremptory mandamus, is not the subject of review on appeal. *Supreme Ct.*, 1862, *People v. Albright*, *Ante*, 305.
10. That questions of negligence, and the exercise or the want of diligence, involving, as they usually do, the consideration of many circumstances, should be left to the tribunal that tried the cause, except where the error is very palpable. [3 *E. D. Smith*, 106; 20 *Barb.*, 282; 6 *Ship.*, 174; *Stor. on Bailm.*, §§ 11-14; *Ang. on Carr.*, §§ 27-51.] *N. Y. Com. Pl.*, 1862, *Morris v. Third Avenue R. R. Co.*, 23 *How. Pr.*, 345.
11. The Appellate Court can review an exercise of discretion in the allowance of amendments at the trial, only so far as to ascertain whether it was in furtherance of justice or not. *Supreme Ct.*, 1860, *Van Ness v. Bush*, *Ante*, 33.
12. The refusal of the judge at trial to allow an amendment to the answer, setting up a new defence, cannot be reviewed on appeal from an order denying a new trial, it not being claimed that the judge abused his discretion. *Supreme Ct.*, 1861, *Hendricks v. Decker*, 35 *Barb.*, 298.
13. In an action brought by one as chamberlain, no objection having been taken on the trial that plaintiff was not chamberlain, it will be assumed, on appeal, that plaintiff's incumbency of the office was understood or taken for granted. *Supreme Ct.*, 1862, *Paige v. Fazackerley*, 36 *Barb.*, 392.
14. Where there is evidence in the case sufficient to sustain a referee's report, but the fact thereby established is not expressly found by the referee, and the appellant, in making the case, has not prepared any finding upon such fact, it will be presumed on appeal that the referee found the fact necessary to sustain the judgment. *Supreme Ct.*, 1861, *Sinclair v. Tallmadge*, 35 *Barb.*, 602.
15. Where two or three independent causes of action are prosecuted in a justice's court, and a judgment is right as to one and erroneous as to the others, and that can be distinctly and plainly seen on appeal, the appellate court have power to reverse as to the erroneous and affirm as to the legal part of the judgment, and ought to do so. [13 *Mass.*, 433.] *Supreme Ct.*, 1862, *Staats v. Hudson River R. R. Co.*, 23 *How. Pr.*, 463; qualifying *Kasson v. Mills*, 8 *Ib.*, 377.
16. An appeal, under § 344 of the Code, to the Supreme Court from an inferior court, is ineffectual unless security for costs be given as on an appeal to the Court of Appeals. *So held*, in the case of an appeal from an order of the City Court of Brooklyn, overruling a demurrer. *Supreme Ct.*, 1861, *Jones v. Decker*, *Ante*, 391.

APPEAL.

17. An appeal from the judgment of a judge, or referee, may be entertained on the judgment-roll and exceptions taken after judgment. No case need be made, where the appellant takes no exceptions during the trial, and desires only to review the conclusions of law, assuming the findings of fact to be correct. The decisions to the contrary [13 N. Y., 341, 345; 14 Ib., 435; 15 Ib., 590; 16 Ib., 610; 16 How. Pr., 224; 29 Barb., 367] are superseded by the amendment of 1860 to § 272 of the Code. *Supreme Ct.*, 1862, *Ferguson v. Hamilton*, 35 Barb., 427.
18. Exceptions to the conclusions of law must, however, in due time, be filed and served. *Ib.*
19. A party desiring to appeal to the Court of Appeals from a decision by the general term, is entitled to have the party who was successful at the general term, enter, or cause to be entered, formal judgment upon the decision; and it is no excuse that formal judgment has not been entered, by reason of the refusal of the clerk to enter it in consequence of some fee claimed by the clerk to be payable for a previous service performed by the party who seeks to have the judgment so entered, that he may appeal. *Supreme Ct.*, *Sp. T.*, 1862, *Purdy v. Peters*, 23 How. Pr., 328.
20. It is no bar to an appeal to the Court of Appeals, that a prior ineffectual appeal has been undertaken by the appellant. *Supreme Ct.*, 1862, *Kelsey v. Campbell*, *Ante*, 368.
21. On appeal from the Marine Court of the city of New York, the New York Common Pleas, on reversing the judgment, remitted the case to the Marine Court for argument. *N. Y. Com. Pl.*, 1861, *Whitlock v. Joseph*, *Ante*, 342.
22. On appeal from the special to the general term of the Marine Court of the city of New York, the appellant has, in all cases, ten days after *written notice* of the entry of judgment to prepare a case or exceptions. The fact that he actually knew of the entry of judgment is immaterial. *Ib.*
23. Hence, if no written notice of the judgment is served, the appellant's time to serve his case is not limited. *Ib.*
24. On appeal from judgments in actions tried by the court, if the case contains no findings of fact, it is the practice of the general term of the first district to dismiss the appeal, unless the parties consent, before the appeal is submitted, to have the case sent back for correction. *Supreme Ct.*, 1862, *Matthews v. Mayor, &c.*, of N. Y., *Ante*, 209.
25. Though it is the duty of the appellant from an order of a surrogate, to procure the surrogate's return, yet where it has not been in his power to do so, the court will not dismiss the appeal until he has had

ARREST.

- reasonable time to do so. *Supreme Ct.*, 1861, *Gilman v. Gilman*, 35 *Barb.*, 591.
26. The heirs, next of kin, and legatees of a testator, are necessary parties to an appeal from an order of the surrogate, admitting the will to probate. *Ib.*
27. Where the unsuccessful party has taken no exceptions to the report of the referee to whom a claim against the estate of a decedent was referred under the statute, and has made no case, the court, on a motion for judgment on the report, cannot do otherwise than to confirm the report, with leave to enter judgment; but it may, in its discretion, give the unsuccessful party leave to except to the report, and to make a case and exceptions which should form part of the judgment-roll, so that he could review the decision of the referee by an appeal. *Supreme Ct.*, 1862, *Coe v. Coe*, *Ante*, 86.
28. Leave to file such exceptions *nunc pro tunc*, and time to make a case and exceptions, was given by the court at general term, on appeal from an order confirming the report. *Ib.*
29. An appeal from the taxation of costs in street cases in the city of New York, cannot be taken after the report of the commissioners is confirmed. To allow an appeal from taxation after the report was confirmed, would be of no avail, because the amount assessed has by a confirmation become a lien. The review of the charges is a part of the matter to be alleged against the report when presented for confirmation. *Supreme Ct.*, 1862, *Matter of Sixty-fifth street*, 23 *How. Pr.*, 256.
30. The provisions of the Code of Procedure (tit. 11, chs. 3, 5)—which relate to appeals from inferior courts to the Supreme Court, Common Pleas, and County Court—made applicable to appeals in proceedings for encroachments upon highways. *Laws of 1862*, 440, ch. 248.

COURT OF APPEALS; HIGHWAYS, 3, 5; MOTIONS AND ORDERS, 16; UNDERTAKING, 1.

ARREST.

1. Except in aggravated cases, an order of arrest against a public officer of the peace should not be granted; but if it has been granted, it should not be set aside by another judge on the grounds of mere expediency, but, at most, the bail should be reduced. *Supreme Ct.*, *Sp. T.*, 1862, *Hart v. Kennedy*, *Ante*, 432.
2. A married woman cannot be arrested in an action against her to recover a fund deposited with her for safe-keeping, and which it is alleged

ARREST.

she has converted, and is about to remove from the State. It is true that a *ne exeat* may issue against a feme covert where a proper foundation is laid for an equitable action against her [2 Vern., 613]; and the power to issue the writ of *ne exeat* in cases of equitable cognizance still exists, and is not impaired or affected by the provisions of the Code [15 Barb., 399]; and the general provisions of the Code, that no person shall be arrested in a civil action except as prescribed by that act (§ 178), and that no female shall be arrested in any action except for wilful injury to person, character, or property (§ 179), only apply to arrests as provided by the Code for the cause of action for which an arrest is given by that act, and not to cases in which the plaintiff was entitled to equitable bail.

But a contract of deposit, made by a married woman, is void, and no action at law or equity will lie upon it. So far as the plaintiff can trace his property he may recover it, or if it is represented by securities which she has taken for the fund, they may be reached, but not in an action against her alone. *Supreme Ct., Sp. T., 1861, Neville v. Neville, 23 How. Pr., 500.*

3. The grantee in a conveyance made in fraud of the grantor's creditors is not liable, in an action brought to set aside the conveyance, to be arrested, on the ground of fraud in contracting the obligation to enforce which the action is brought [Code, § 149, subd. 4]; at least where there is no evidence imputing to him actual bad faith. *Supreme Ct., 1862, Fassett v. Tallmadge, Ante, 188; and see Mallory v. Leach, Ante, 449, note.*
4. The fact that a creditor has accepted the promissory note of his debtor, for money received in a fiduciary capacity, is no bar, after the dishonor of the note, to an arrest in an action on the original indebtedness, the plaintiff being ready to return the note. *Supreme Ct., 1862, Shipman v. Shafer, Ante, 449.*
5. Where a debtor who had received money in a fiduciary capacity, gave the creditor his check for it, which was protested for non-payment;—*Held*, that it was no objection to an order of arrest against the debtor, in an action to recover the money, that the complaint demanded the costs of protest in addition to the amount of the check, the costs of protest not being claimed as a separate cause of action. *Ib.*
6. The last clause of section 34 of the act establishing the Metropolitan Police (*Laws of 1860, 446, ch. 259*),—providing that “no person holding office under this act shall be liable to military or jury duty, nor to arrest on civil process, or to service of subpœnas from civil courts, whilst actually on duty,”—is to be read as meaning, “nor, whilst actually on duty, to arrest on civil process, or to service of subpœnas

 ASSIGNABILITY OF CAUSE OF ACTION.

- from civil courts." *Supreme Ct., Sp. T.*, 1862, Hart *a.* Kennedy, *Ante*, 432.
7. The superintendent and the captains, since they are charged with a constant supervision of the operations of the force, are to be deemed always on duty, so that they are exempt at all times during the continuance of their terms of office, while prepared for duty. *Ib.*
 8. Patrolmen of the force are not to be deemed actually on duty during their fixed and known intervals of remission from duty. *Ib.*
 9. No person belonging to the military forces shall be arrested on any civil process while going to, remaining at, or returning from any place at which he may be required to attend for military duty. *Laws of 1862*, 945, ch. 477, § 312.
 10. Where the defendant upon affidavit moves to vacate an order of arrest, which was granted on the ground of fraud in contracting the obligation upon which the action is brought, evidence of other contemporaneous frauds committed by the defendant is admissible, from its tendency to sustain the original charge of fraud, and to determine to which of the parties, in case of conflicting affidavits, credence should be given. *Supreme Ct., Chambers*, 1861, Scott *a.* Williams, *Ante*, 70.
 11. The provision of section 204 of the Code is obligatory, not permissive; so that a motion to vacate an order of arrest cannot be made after the entry of judgment in the action. *Supreme Ct.*, 1862, Barker *a.* Wheeler, *Ante*, 170.
 12. An order of arrest should not be set aside for failure to serve the complaint, where the laches has been excused. *Supreme Ct., Sp. T.*, 1862, Ferris *a.* Soley, 23 *How. Pr.*, 422.
 13. An order of arrest vacated, on a conflict of affidavits as to the facts relied on as establishing fraud. *Supreme Ct., Sp. T.*, 1861, Mecklin *a.* Berry, 23 *How. Pr.*, 380.

DISCONTINUANCE, 2; EXECUTION, 8-11; JUDGMENT, 10.

ASSESSMENTS.

NEW YORK (CITY OF), 1-5.

 ASSIGNABILITY OF CAUSE OF ACTION.

1. A cause of action in favor of a public officer, against an intruder, for wrongfully receiving the fees of the office, is assignable. *Supreme Ct.*, 1862, Platt *a.* Stout, *Ante*, 178.
2. The claim of a sheriff for services rendered and expenses incurred in

 ASSIGNMENT FOR BENEFIT OF CREDITORS.

the execution of process, is assignable. *Supreme Ct.*, 1862, Birkbeck *a.* Stafford, *Ante*, 286.

3. A cause of action for the conversion of funds intrusted to defendant as an agent, for which he has not accounted,—*Held*, assignable. It would survive to the personal representatives. *Supreme Ct.*, 1862, Gould *a.* Gould, 36 *Barb.*, 270.

ASSIGNMENT.

The authority of one copartner to sell the copartnership property to a particular creditor or creditors in payment of their debts is well settled. This authority extends to assignments for antecedent debts, as well as for debts thereafter to be contracted on account of the firm. *Supreme Ct.*, 1862, McClelland *a.* Remsen, *Ante*, 332.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. In equity, an insolvent debtor is trustee for his creditors, and he is bound to distribute his property among them, or allow them to collect their claims out of it. A change of the title to the property to a trustee may operate to obstruct the employment, by a creditor, of legal remedies against that property. The imposition upon that change of title of a trust, or condition, by which the share of each creditor in the assigned assets is made to depend on his leniency to the assignor, virtually retains power in the assignor's hands, over the property for his own benefit, and therefore makes the assignment void. *N. Y. Superior Ct.*, *Chambers*, 1861, Gasherie *a.* Apple, *Ante*, 64.
2. Whatever purpose, which if declared in writing and inserted in a general assignment of a debtor's property, renders it void as legally fraudulent, ought, when declared by the debtor, verbally, to be the object of an intended assignment, while holding possession of the property, to be considered as of an equally fraudulent character. *Ib.*
3. An assignee for benefit of creditors is not entitled to the same favor in equity as a purchaser for a valuable consideration. He acquires no better title than his assignor had. *N. Y. Com. Pl.*, *Sp. T.*, 1862, Schiefelin *a.* Hawkins, *Ante*, 112.
4. Under the act of 1860 (*Laws of 1860*, 594, ch. 348, § 1),—requiring assignments for benefit of creditors to be in writing, and duly acknowledged before delivery,—an assignment which is proved by a subscribing witness is not effectual. *N. Y. Com. Pl.*, 1862, Cook *a.* Kelly, *Ante*, 466.
5. The statute requires that where several debtors make an assignment,
Vol. XIV.—31

ATTACHMENT.

each shall join in the acknowledgment, and in verifying an inventory. *Ib.*

6. The provisions of the act of April 13, 1860 (*Laws of 1860, 595, ch. 348*),—which require general assignments for the benefit of creditors to be acknowledged by the assignor before delivery, and schedules to be made within 20 days thereafter,—are directory merely. *Supreme Ct., Sp. T., 1862, Fairchild a. Gwynne, Ante, 121.*

ATTACHMENT.

1. An attachment may issue, under the Code, against the property of a debtor who has made a fraudulent assignment for the benefit of creditors, although the assignment is valid on its face under the law of 1860. *Supreme Ct., 1861, Skinner a. Oettinger, Ante, 109.*
2. It is not necessary that the plaintiff in the action in which such attachment is issued, should be a judgment-creditor. *Ib.*
3. The proceeding by attachment to compel the payment of money is a civil remedy, and unless a legal right be established, the application for attachment is without foundation; and after the remedy by action is barred by the Statute of Limitations, no attachment will be granted against an attorney to compel the payment of moneys collected by him. [31 Barb., 439.] *Supreme Ct., Sp. T., 1862; People a. Brotherson, 36 Barb., 662.*
4. In cases of attachment issued out of a justice's court, or district court of New York, service of the attachment and inventory upon a person in charge of the property attached is insufficient, unless it appears affirmatively that the defendant has no place of residence within the county. *N. Y. Com. Pl., 1862; Marshall a. Canty, Ante, 237.*
5. Where an attachment was issued as a provisional remedy under the Code, on the ground that the defendant was about to dispose of his property with intent to defraud creditors; such intent being manifested in a threat, that if sued "he would make an assignment, and plaintiff could not get any thing, and he would do business under somebody else's name;" and defendant in his affidavit, read on the motion to vacate the attachment, set forth that he had sufficient property to pay all his debts in full if his creditors had given him a little time;—*Held*, that if the defendant was able to pay all his debts, his threat of making an assignment under which plaintiff would not get any thing, was evidence of an intention to defraud his creditors; and that the language attributed to him manifested a purpose to dispose of his property with intent to defraud creditors, and to conceal his property or earnings from plaintiff's pursuit. *N. Y. Superior Ct., Chambers, 1861, Gasherie a. Apple, Ante, 64.*

ATTORNEY.

6. *It seems* that irrespective of the question whether the mortgagor of goods has, even before the money secured becomes due, any property in them, subject to levy and sale on execution, unless he reserves a right to the possession of them for a definite time,—he has, before the money secured by the mortgage has become due, an interest which is subject to seizure under attachment. By section 234 of the Code, it is declared, after enumerating certain kinds of property, that “all other property in this State, of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution.” The mortgagor has at least an equity of redemption in the chattel, which is a property in it, subject to levy by virtue of the attachment. *Supreme Ct.* (1862?), *Hall v. Samson*, 23 *How. Pr.*, 84.
7. *It seems* that where the goods mortgaged are actually seized under the attachment, and so returned, the officer is not a trespasser because he omits to specify the debtor’s interest, as an equity of redemption, in his return, and on selling the goods. *Ib.*
8. The defendant may move to vacate an attachment, issued as a provisional remedy under the Code, as well after as before the assignment of his interest in the property attached. *N. Y. Superior Ct., Chambers*, 1861, *Gasherie v. Apple*, *Ante*, 64.

EVIDENCE, 27 ; JUDGMENT, 3 ; JUSTICES’ COURTS ; SHIPPING.

ATTORNEY.

1. Any attorney of the Supreme Court of this State, heretofore regularly admitted and licensed, and whose only office for the transaction of law business is within this State, may practise as such attorney in any of its courts notwithstanding he resides in a State adjoining. Service of papers which might, according to the practice, be made on him at his residence, if it were within the State, may be made by depositing the same in the post-office in the city or town where his office is, directed to him at his office, and paying the postage thereon ; and such service is equivalent to personal service at his office. *Laws of 1862*, 139, ch. 43, § 1.
2. No person to practise as attorney in any of the courts in the city and county of New York, unless regularly admitted to practise by the Supreme Court. *Laws of 1862*, 970, ch. 484, § 1.
3. The act relating to city courts in Brooklyn (*Laws of 1852*, 459, ch. 314) amended by adding to § 1 the following : No person shall be permitted to appear before any justice or justices of the peace or before the police justice in said city, in any suit, action, matter, or proceeding, either civil or criminal, as the attorney or representative of any party or parties to such suit, action, or proceeding, unless such person is an attorney and counsellor-at-law of the Supreme Court of this State, and any violation of this provision is hereby declared a misdemeanor on the part of the justice knowingly permitting the same. *Laws of 1862*, 170, ch. 53, § 1 ; amending *Laws of 1852*.
4. A party in an action has no right to change his attorney without

BANKING.

- leave of the court. The court before granting this leave will consult the rights of the attorney, and will not allow the change until the just claims of the latter are discharged or secured. *Supreme Ct., Chambers, 1862, Hoffman a. Van Nostrand, Ante, 336.*
5. An attorney is bound by the acts and declarations of his managing clerk, in matters within the scope of the latter's agency. *Supreme Ct., 1862, Birkbeck a. Stafford, Ante, 285.*
 6. The lien of the attorney is an equitable right to be paid for his services out of the proceeds of the judgment or other proceeding obtained by his labor and skill, which the court will compel to the extent of its equitable power. Under the Code, the lien is not limited to the taxable costs; but the attorney, unless the proceeds have come into his hands, must invoke the equitable aid of the court to ascertain the existence and amount of the lien before any steps can be taken to enforce it. *Supreme Ct., 1862, Ackerman a. Ackerman, Ante, 229.*
 7. Payment by a judgment-debtor to a judgment-creditor, of the amount of the judgment, is valid against the lien of the attorney, unless the debtor has notice of the attorney's claim by way of lien to a portion of such judgment. *Ib.*
 8. The lien of the attorney attaches not merely to the costs in the judgment, but to the whole judgment—damages and costs. *Ib.*
 9. The attorney is liable to the sheriff for fees on process delivered to him for execution. *Supreme Ct., 1862, Birkbeck a. Stafford, Ante, 285.*

LIMITATIONS, 4; SERVICE, 1, 2; WITNESS, 3-5.

BAIL.

1. In the case of a subordinate officer, whose acts, which form the cause of action, were done in obedience to commands of a superior, the bail may, in the discretion of the court, be reduced to a nominal sum. *Supreme Ct., Sp. T., 1862, Hart a. Kennedy, Ante, 432.*
2. The quashing of an indictment which the accused had given bail to appear and answer,—*Held*, a discharge of the obligation of the sureties, and as authorizing the prisoner to depart from court without any special permission or order therefrom. *Supreme Ct., 1860, People a. Felton, 36 Barb., 429.*

ARREST, 1.

BANKING.

The act to restrain unauthorized banking is inapplicable to obligations

CAUSE OF ACTION.

not payable on demand. *Supreme Ct.*, 1862, Hubbard *a.* N. Y. & Harlem R. R. Co., *Ante*, 275.

BONA-FIDE PURCHASERS.

ASSIGNMENT FOR BENEFIT OF CREDITORS, 3 ; FORECLOSURE, 1 ; JUDICIAL SALE, 15 ; SUPPLEMENTARY PROCEEDINGS, 6.

BOND.

CONTEMPT, 8.

BURDEN OF PROOF.

EVIDENCE.

CALENDAR.

The court will not at special term fix the date as of which a cause is to be placed in the calendar. The date is controlled by the statute, and if it is put on incorrectly, application must be made at circuit. *Supreme Ct.*, *Sp. T.*, 1861, North *a.* Sargeant, *Ante*, 224.

COURTS, 2 ; TRIAL, 1, 2.

CASE.

The settlement of a case is a judicial and not a ministerial act. *N. Y. Superior Ct.*, *Chambers*, 1862, Fielden *a.* Lahens, *Ante*, 48.

APPEAL ; REFERENCE, 10.

CAUSE OF ACTION.

1. The defendant, owner of land adjoining plaintiff's, employed workmen to cut trees on his own land, but omitted to employ competent persons to superintend the work, or properly to instruct them, so that they might distinguish his boundaries.

Held, that defendant was liable for trees of the plaintiff which the workmen ignorantly cut down and removed. *Supreme Ct.*, *Sp. T.*, 1862, Carman *a.* Mayor, &c., of N. Y., *Ante*, 301.

2. A master who has not taken sufficient care in employing servants suitable to the work undertaken, or who has failed to direct them properly in its performance, is liable for injuries to others arising from such neglect. *Ib.*

CAUSE OF ACTION.

3. An action will not lie by one judgment-creditor against another to determine the priority of their respective liens upon the equitable property of the judgment-debtor in the hands of the receiver. *Supreme Ct.*, 1861, Myrick *a.* Selden, 36 *Barb.*, 15.
4. Possession of lands adjoining a road, for seventy years,—*Held*, sufficient to enable plaintiffs to maintain trespass or ejectment. *Supreme Ct.*, 1862, Dunham *a.* Williams, 36 *Barb.*, 136.
5. An action is maintainable against a person who has wrongfully received the fees of an office, which the plaintiff holds or is entitled to hold, to recover such fees. *Supreme Ct.*, 1862, Platt *a.* Stout, *Ante*, 178.
6. It is not necessary that a seller, to enable him to maintain an action for the price of goods fraudulently purchased, should have had possession, at the commencement of the suit, of the bills or other paper given by the fraudulent buyer at the sale. The production and surrender at the trial are sufficient, although at some period before the trial they were out of plaintiff's possession. *Supreme Ct.*, 1862, Fraschieris *a.* Henriques, 36 *Barb.*, 276.
7. Where a firm note was given to one of the partners for money advanced by him to the firm, and was indorsed to another, after maturity, for value,—*Held*, that the holder might maintain an action thereon against the makers. [5 *Cow.*, 688.] *Supreme Ct.*, 1862, Sherwood *a.* Barton, 36 *Barb.*, 284.
8. Such a note may be subject to any set-off which the partnership has; but if no such defence is proved, they cannot avail themselves of the defence, that if the note had remained the property of the payee, his remedy would have been by another form of action. *Ib.*
9. Where a new note is received as collateral security to a note overdue, the right of immediate action on the note overdue is not suspended, and the indorser or surety is not discharged. [5 *Hill*, 463; 3 *Den.*, 512; 6 *Duer*, 294; 13 *Wend.*, 375; 3 *McLean*, 589.] *Supreme Ct.*, 1862, Taylor *a.* Allen, 36 *Barb.*, 294.
10. A power in trust, valid in itself, but which has become ineffectual by reason of subsequent events not impeaching its original validity, but only destroying its future operation, will not be set aside as a cloud upon the title, unless there be some circumstances which bring the case under some one of the other heads of chancery jurisdiction, such as discovery, injunction, and the like. *Supreme Ct.*, 1861, Hotchkiss *a.* Elting, 36 *Barb.*, 38.
11. A patent for lands by the State is presumed to have issued regularly, and if not void on its face, it cannot be avoided collaterally in a suit between individuals. If there is any pretence that it was issued by

CERTIORARI.

mistake or upon a false suggestion, it is voidable only, and in such case can be only avoided by a direct proceeding to cancel or annul the patent. [6 Cow., 281.] It is not incumbent, therefore, on the grantee to show the regularity of all the prior proceedings. *Supreme Ct.*, 1862, *Brady v. Begun*, 36 *Barb.*, 533.

12. Preoccupation of mind, surprise, and a misapprehension, on the part of the grantor, of the legal effect of a deed, afford no ground for setting it aside, in the absence of fraud, undue influence, mistake, or error. *Supreme Ct.*, *Sp. T.*, 1862, *Wetmore v. Holsman*, *Ante*, 311.

ACTION; ASSIGNABILITY OF CAUSE OF ACTION; COMPLAINT; CONVERSION; COUNTER-CLAIM, 3; DEMAND, 3; INJUNCTION, 1, 3, 4; INSURANCE; JOINDER OF ACTIONS; LIBEL; MANDAMUS, 3; PLEADING; REMOVAL OF CAUSES, 1; SPECIFIC PERFORMANCE; SUBROGATION.

CERTIORARI.

1. If referees appointed to hear and determine an appeal from an order of the commissioners of highways dismiss the appeal, the remedy of the party is not by a common-law certiorari to review the proceedings, but, *it seems*, by a mandamus, to compel the referees to proceed. *Supreme Ct.*, 1862, *People v. Cortelyou*, 36 *Barb.*, 164.
2. Upon a common-law certiorari for the removal of summary convictions before magistrates, the power of review is not confined to questions affecting either the jurisdiction of the magistrate or the regularity of the proceedings before him, but extends to all other legal questions; and unless it appears upon the face of the record that there was evidence sufficient to warrant the conviction, it will be quashed. It is true, that such a certiorari removes only the record. But the magistrate, in these cases, must insert the evidence in the record of the conviction itself, for the express purpose of enabling the superior court, upon a removal of the proceedings by certiorari, to determine upon the face of the conviction whether it was lawful; and although the court would not interfere upon a question as to the mere weight of the evidence, yet a conviction without any evidence to support, has always, in the English courts, been reversed or quashed as erroneous. [2 *Stra.*, 919, 996; 8 *T. R.*, 220, 584, 587; 7 *East*, 289.] *Ct. of Appeals*, 1862, *Mullins v. People*, 23 *How. Pr.*, 289.
3. The fact that summary proceedings for the possession of lands are conducted in a harsh and oppressive manner, and that the tenant may not have had actual notice of them, are not grounds upon which the proceedings can be reversed on certiorari. *Supreme Ct.*, 1862, *People v. Simpson*, *Ante*, 457.

CITY COURT OF BROOKLYN.

CHARGE.

TRIAL.

CHATTEL MORTGAGE.

1. A chattel mortgage, duly filed, is valid against one who purchases the property within one year from the filing, notwithstanding it is not refiled at the end of the year. [14 N. Y., 71; 29 Barb., 68; 13 N. Y., 556.] *Supreme Ct.*, 1860, Dillingham *a.* Ladue, 35 Barb., 38.
2. And a buyer, after the lapse of the year, from one who bought the property within the year, takes it subject to the mortgage. *Ib.*
3. The priority of a mortgage upon a canal-boat, which has been filed with the proper town-clerk, will not be lost by the neglect of the mortgagee to file in the auditor's office the statement provided for by section 1, ch. 247, of Laws of 1858. *Supreme Ct.*, 1861, Sweet *a.* Lawrence, 35 Barb., 337.
4. The utmost effect of that statute is to put mortgages of canal-boats, registered in the auditor's office, on an equality with those filed with town-clerks. *Ib.*

ATTACHMENT, 6; EVIDENCE, 6.

CITY COURT OF BROOKLYN.

1. The City Court of Brooklyn has power to set aside, on motion, a judgment, for irregularity, although the judgment was entered upon an *ex-parte* application to that court. *Supreme Ct.*, 1861, Richardson *a.* Bates, 23 How. Pr., 516.
2. The City Court of Brooklyn has jurisdiction of an action brought against the Brooklyn Ferry Company to recover damages for an injury to plaintiff's boat, caused by a collision. [Laws of 1849, 170, ch. 125, § 2.] *Supreme Ct.*, 1862, Crofut *a.* Brooklyn Ferry Co., 36 Barb., 201.
3. The clerk of the City Court of Brooklyn, whose compensation for services is fixed by the Laws of 1850, 148, §§ 7, 25, at an annual salary, and who is to receive the same fees for his services in civil cases as provided for similar services by the county clerk, and to pay such fees to the county treasurer of Kings county,—has no authority to retain in his hands, as his own, the fees received by him for the naturalization of aliens. The classification of the business of the courts into civil and criminal cases, includes all business of every description. There are no mixed cases, partly civil and partly criminal. When the act speaks of fees in civil cases, the terms are to be construed as synonymous with

COMPLAINT.

civil proceedings; that is, proceedings not criminal, or instituted with the purpose of punishing for crimes. The forms and orders and acts by which an alien is admitted to the rights of citizenship, are proceedings in a civil case. *Supreme Ct.*, 1862, *People v. Seabury*, 23 *How. Pr.*, 121.

ATTORNEY, 3.

CLAIM AND DELIVERY.

In an action for chattels in which proceedings of claim and delivery are taken, the defendant waives an objection to the sufficiency of the plaintiff's affidavit upon which the property is taken, by giving an undertaking and obtaining a redelivery of the property to himself. *Supreme Ct., Sp. T.*, 1862, *Wisconsin Marine & Fire Ins. Co. Bank v. Hobbs*, 22 *How. Pr.*, 494.

SECURITY FOR COSTS, 1.

CLERK.

The clerk, on being tendered his fee for entering a judgment, is bound to enter it, even although a fee for a previous service rendered remains unpaid by either party. *Supreme Ct., Sp. T.*, 1862, *Purdy v. Peters*, 23 *How. Pr.*, 328.

CITY COURT OF BROOKLYN, 3.

CLOUD ON TITLE.

CAUSE OF ACTION, 10; PLEADING, 10.

COMMISSION.

DEPOSITION.

COMPLAINT.

1. Every thing which was necessary to sustain a plaintiff's case at common law, unless made unnecessary by statute, must be alleged in his complaint. *Supreme Ct.*, 1862, *Freeman v. Fulton Fire Ins. Co.*, *Ante*, 398.
2. If the plaintiff sues as trustee or agent, he must allege in his complaint the existence of such trust, and show his authority to collect the amount of the insurance. *Ib.*

CONCILIATION.

3. A complaint in such an action, which alleges an insurance effected by the plaintiff with the defendant, but shows no interest in the thing insured existing in the plaintiff at the time of the loss, and no authority conferred upon him by the owner, except to pay the premium, is bad on demurrer. *Ib.*
4. To charge the indorser upon a note payable at a particular place, the complaint must contain an averment to the effect that payment was demanded at such place. *Supreme Ct.*, 1862, *Ferner v. Williams*, *Ante*, 215.
5. In an action against the indorser of a promissory note payable at a particular place, the complaint averred that at maturity the note was duly presented for payment to the makers;—*Held*, a sufficient averment of presentment at the place named. *Ib.*
6. In an action upon a fire insurance policy, for the amount of a loss, the complaint must allege that the plaintiff had an interest in the thing insured, at the time of the loss; unless the claim was assigned to him afterwards, or unless he sues as trustee of an express trust. *Supreme Ct.*, 1862, *Freeman v. Fulton Fire Ins. Co.*, *Ante*, 398.
7. The form of declaration allowed by 2 Rev. Stat., 347, § 1, in actions of debt to recover any money, goods, or things, received by any person contrary to the provisions of any statute, is not objectionable under the Code for not containing facts sufficient to constitute a cause of action. *Superior Ct.*, *Sp. T.*, 1862, *Betts v. Bache*, *Ante*, 279.
8. A complaint which avers "that the defendant received the sum of \$1813.47 belonging to, or on account of the plaintiff, and which is now due him," states facts sufficient to constitute a cause of action. *Ib.*
9. It is not necessary or proper for plaintiff to set up, in his complaint, facts which he relies on to avoid an anticipated defence; and if he does so, since the allegation is immaterial, defendant does not admit it by not denying in his answer. Thus where plaintiff in an action brought more than six years after the cause of action accrued, alleged that he had been restrained from suing by an injunction,—*Held*, that defendant need not deny this allegation in an answer setting up the Statute of Limitations. *Supreme Ct.*, 1862, *Sands v. St. John*, 23 *How. Pr.*, 140.
10. Sufficiency of complaint in an action for illegal appropriation of funds intrusted to defendant as an agent. *Gould v. Gould*, 36 *Barb.*, 270.

CONCILIATION.

TRIBUNAL.

CONTEMPT.

CONFESSION OF JUDGMENT.

An averment in a statement for judgment on confession that the indebtedness arose for money loaned and advanced by the plaintiff to the defendant at a time mentioned, including interest thereon to date,—is a sufficient statement of the facts out of which the indebtedness arose. *Supreme Ct., Chambers, 1862, Lyon v. Sherman, Ante, 393.*

CONFLICT OF LAWS.

LIMITATIONS, 9.

CONSTABLE.

Constables in the city of New York hereafter to be termed marshals. Their appointment, official bond, &c. *Laws of 1862, 971, ch. 484, §§ 4, 15.*

CONSULS.

JURISDICTION, 5, 7.

CONTEMPT.

1. The provision of 2 Rev. Stat., 278, § 8, subd. 3,—which authorizes the court to punish as for a criminal contempt persons guilty of wilful disobedience to a process or order lawfully issued or made,—does not authorize such punishment for non-compliance with a judgment directing the payment of money. *Supreme Ct., Chambers, 1860, Fassett v. Tallmadge, Ante, 188.*
2. The fact that a plaintiff has not done enough at the time of procuring defendant's conviction of a contempt in disobeying a portion of the decree, to procure his conviction for a disobedience of another portion, does not disable plaintiff from doing such other acts as are necessary to put the defendant in contempt in that respect. *N. Y. Superior Ct., 1862, Morris v. Walsh, Ante, 387.*
3. The authority to punish for a contempt in supplementary proceedings given by section 302 of the Code, applies to the case of a refusal to answer proper questions, as well as to a refusal to appear and submit to be examined. *Supreme Ct., 1862, Clapp v. Lathrop, 23 How. Pr., 423.*
4. The fact that, on serving defendant with an injunction order in supplementary proceedings, the original was not shown to him, is not a ground for refusing to fine him for the indemnity of the creditor by way of punishing him for the contempt. Clear knowledge on the part

CORPORATION.

of a judgment-debtor, that an order in supplementary proceedings against him has been made, restraining him from disposing of his property, is sufficient to impose upon him the duty of obeying it, at least so far as the pecuniary rights of the relator are concerned. [3 Edw., 236; 4 Paige, 360, 405; 1 Duer, 563; overruling or questioning 4 Sandf., 639; 9 N. Y., 278.] *Supreme Ct.*, 1861, *Livingston v. Swift*, 23 *How. Pr.*, 1.

5. Where the alleged contempt consists in the refusal to answer questions, which refusal the party admits and seeks to justify, the filing of interrogatories is unnecessary. *Supreme Ct.*, 1862, *Clapp v. Lathrop*, 23 *How. Pr.*, 423.
6. On an application to punish for contempt, where interrogatories have been administered to the party accused, the moving party may read affidavits to contradict his answers. *Supreme Ct.*, *Chambers*, 1862, *Smith v. Smith*, *Ante*, 130.
7. On an order to show cause why a party should not be punished for contempt, a conviction may be had, and punishment imposed, without issuing an attachment or filing interrogatories. *Supreme Ct.*, *Chambers*, 1862, *Taylor v. Baldwin*, *Ante*, 166.
8. A bond taken from a prisoner under an attachment for contempt, with one surety, instead of two, is irregular, not void. *Supreme Ct.*, 1862, *Morton v. Campbell*, *Ante*, 410.

RECEIVER, 5; SERVICE, 4.

CONVERSION.

1. The mere facts of lawful possession in the plaintiff, and wrongful taking by the defendant, are sufficient to sustain an action for wrongful conversion. Proof of title in a third person is no defence. [7 Cow., 752; 9 Ib., 670; 11 Wend., 54, 57, n.; 13 Ib., 63; 16 Ib., 571.] *Supreme Ct.*, 1861, *Hendricks v. Decker*, 35 *Barb.*, 298.
2. In such an action, these essential facts being proved, the burden is upon the defendant to prove his title to the property. *Ib.*

ASSIGNABILITY OF CAUSE OF ACTION, 3.

CORPORATION.

Under a statute provision that the officer of a corporation making a false certificate shall be liable for all the debts of the corporation, contracted while he is an officer or stockholder, such liability extends to debts

COSTS.

contracted by the corporation in favor of the officer during that period. *N. Y. Com. Pl., Sp. T.*, 1862, *Wait v. Ferguson*, *Ante*, 379.

EXECUTION, 1, 2; RECEIVER, 1, 2; RELIGIOUS CORPORATION; STOCK-HOLDERS; TRIAL, 2.

COSTS.

1. A County Court in dismissing the complaint, on defendant's demurrer, for the ground that the court had no jurisdiction of the subject of the action,—*Held*, authorized to award judgment to defendant for costs thereon. Costs could no more be denied defendant who had succeeded in establishing that the court had not jurisdiction, than to a plaintiff who had shown that it had. *Supreme Ct.*, 1862, *King v. Poole*, 36 *Barb.*, 242.
2. In an action to obtain the delivery of personal property, the plaintiff had a verdict for the return of a portion of the property, assessed at \$200 in value, and the defendant a verdict for the residue.
Held, that each party was entitled to costs against the other. *N. Y. Superior Ct., Chambers*, 1862, *Porter v. Willet*, *Ante*, 319.
3. In an action against several defendants, not united in interest, and making separate defences by separate answers, on judgment for all the defendants, it is in the discretion of the court to restrict the defendants to one bill of costs, or to allow costs to certain of the defendants, according to the circumstances of the case. *Supreme Ct., Chambers*, 1862, *Harper v. Chamberlain*, *Ante*, 408.
4. Under 2 Rev. Stat., 619, § 44, which provides that the costs of an action brought in the name of another, by an assignee or person beneficially interested in the recovery, shall be charged upon the party in interest, applies only to cases where the assignee or party in interest is chargeable with having brought the action. *Supreme Ct., Sp. T.*, 1862, *Wheeler v. Wright*, *Ante*, 353.
5. A receiver appointed in supplementary proceedings brought an action by order of the court, without the interference or direction of the judgment-creditor, and costs were awarded to the defendants.
Held, that the judgment-creditor was not chargeable with such costs, on the ground that he was beneficially interested in the recovery. *Ib.*
6. Where the action was commenced and prosecuted in the name of the plaintiff, for the benefit of another person, and the attorney did not claim costs from the plaintiff, but from the real prosecutor,—*Held*, that the plaintiff could not change his attorney without satisfying the attorney's claim for costs. *Supreme Ct., Chambers*, 1862, *Hoffman v. Van Nostrand*, *Ante*, 336.

COUNTER-CLAIM.

7. The cases in which allowances are provided for in § 308 of the Code, are excluded from the operation of § 309 of the Code. *Supreme Ct.*, 1862, *Hotaling v. Marsh*, *Ante*, 161.
8. The power of courts of equity to grant counsel-fees out of a common fund belonging to the parties to the action, as a part of the relief which should be given on the final disposition of the cause, is not affected by the Code. *Ib.*
9. Provision, under the equitable power of the court, for the payment of counsel-fees out of a common fund belonging to the parties in the action, can be made only by the judge who tried the cause. *Ib.*
10. Circumstances from which it should be inferred that a defence instituted by an executor was rather for the purpose of delaying than in the expectation of defeating the plaintiff's recovery, and therefore unreasonably resisted. *Supreme Ct.*, *Sp. T.*, 1862, *Boyd v. Wilkin*, 23 *How. Pr.*, 137.
11. The provisions of Laws of 1859, 570, § 2, prohibiting the recovery of costs against municipal corporations unless notice of the claim has been given to the comptroller before suit brought,—*Held*, to apply to claims for damages on account of the negligence or misconduct of the authorities as well as to demands upon contract. *Supreme Ct.*, 1862, *Hart v. City of Brooklyn*, 36 *Barb.*, 226.
12. Upon granting a new trial, when the judge before whom the trial was had committed no error, payment of the costs of the trial, and of all subsequent proceedings, should be imposed as a condition of granting the favor. *Supreme Ct.*, 1862, *North v. Sargeant*, *Ante*, 223.
13. The fees of a stenographer, whose employment is directed by the court, under § 256 of the Code of Pro., cannot be taxed as costs in the cause. *N. Y. Superior Ct.*, 1862, *Gilman v. Oliver*, *Ante*, 174.
14. The amount paid for stenographer's fee should be allowed to the prevailing party, on the adjustment of costs, as a necessary disbursement. *N. Y. Com. Pl.*, 1861, *Reynolds v. Mayor, &c.*, of N. Y., *Ante*, 176, *note*.

DISCONTINUANCE; JUDICIAL SALE, 11; MARRIED WOMAN, 6; MOTIONS AND ORDERS, 17, 18; SHERIFF, 6.

COUNTER-CLAIM.

1. In an action for rent, the defendant may set up as a counter-claim any damages which he has sustained by the acts of the landlord about the premises leased. *Supreme Ct.*, 1861, *Rogers v. Ostrom*, 35 *Barb.*, 523.
2. Where a tenant, after dispossession under summary proceedings, sued

COURT OF APPEALS.

to recover a month's rent deposited with the landlord as collateral security for the last month under the agreement,—*Held*, that the landlord could interpose as a counter-claim a month's rent due to him prior to the dispossession. [1 E. D. Smith, 416.] *N. Y. Com. Pl.*, 1862, *Healy v. McManus*, 23 *How. Pr.*, 238.

3. In an action for divorce, on the ground of adultery, the defendant cannot interpose as a defence, either as a bar to the action or as a counter-claim, cruel and inhuman treatment and abandonment by the plaintiff, of the defendant. The action for divorce is not one founded on contract, but for the breach of a legal duty; and the transaction out of which it arises is not the marriage but the adultery. *Supreme Ct.*, 1862, *Griffin v. Griffin*, 23 *How. Pr.*, 183.

ANSWER, 2.

COUNTIES.

The provisions of the Laws of 1861, 158, ch. 83,—which limits the time for submitting claims against certain counties,—apply to all claims, whatever their form, which are required by law to be presented to boards of supervisors to be audited by them. *Supreme Ct., Sp. T.*, 1862, *People v. Supervisors of Monroe*, 23 *How. Pr.*, 395.

COURTS.

1. An order of the county judge appointing the County Court merely, does not authorize the holding of a Court of Sessions; and no valid verdict can be found at Courts of Sessions held under it. *Supreme Ct.*, 1862, *People v. Wilcox*, 23 *How. Pr.*, 297.
2. Courts of record, excepting in the city and county of New York, at general term, may, by orders entered in minutes, authorize clerk to cause the calendars of causes to be printed. *Laws of 1862*, 239, ch. 86, § 1.
3. In street assessments, and proceedings of the like character, the courts cannot interfere by virtue of their general jurisdiction, but can only act in execution of the powers specially conferred upon them by the statute authorizing the particular proceeding. [3 N. Y., 511; 7 Johns., 541.] *Supreme Ct.*, 1861, *Morse v. Williamson*, 35 *Barb.*, 472.

PROHIBITION, 2, 3.

COURT OF APPEALS.

The Court of Appeals cannot look beyond the findings of facts contained in the case, in order to draw any inferences of fact bearing upon the appeal. *Ct. of Appeals*, 1859, *Stewart v. Smith*, *Ante*, 75.

DEFAULT.

COURT OF SESSIONS.

1. The history of Courts of Sessions, considered. *People v. Powell*,* *Ante*, 91.
2. The Court of General Sessions of the Peace, in and for the city and county of New York, empowered to extend its terms and make adjournments. *Laws of 1862*, 19, ch. 10.

CREDITOR'S ACTION.

1. Upon a judgment against joint-debtors in an action in which a part only have been served with summons, a creditor's action can be maintained to reach joint property of all, when an execution against their joint property and the individual property of the defendants served has been returned unsatisfied. *Supreme Ct., Sp. T.*, 1862, *Field v. Chapman*, *Ante*, 133.
2. *It seems*, that a creditor's action may be commenced before the lapse of sixty days from the issuing of execution, where it has been returned unsatisfied within that time. *Ib.*
3. In a creditor's action against a judgment-debtor and his debtor, to reach securities held by the former, the plaintiff is in no better position than an assignee of the judgment-debtor. *N. Y. Superior Ct., Sp. T.*, 1861, *McGay v. Keilback*, *Ante*, 142.

CAUSE OF ACTION, 3; COSTS, 5.

DAMAGES.

EVIDENCE, 25, 29, 30.

DECLARATIONS.

EVIDENCE, 11-13.

DEFAULT.

A motion to open a default on the ground of absence of a material witness, or engagement of counsel, should be denied where these excuses

* This case is overruled by that of the *People v. N. Y. General Sessions*, which will appear in our next volume.

DEMAND.

were offered and disregarded at the circuit. *Supreme Ct., Sp. T., 1862, Ward a. Ruckman, 23 How. Pr., 330.*

DISMISSAL OF COMPLAINT, 2; DISTRICT COURTS OF NEW YORK, 7.

DEFENCES.

1. An agreement to arbitrate is no bar to an action. [5 N. Y., 422.] *Supreme Ct., 1861, Sinclair a. Tallmadge, 35 Barb., 602.*
2. One to whom a pledgee wrongfully delivers the pledge cannot avail himself of the fact that the owner is indebted to the pledgee, as a defence against the owner's action. *Supreme Ct., 1862, Felt a. Heye, 23 How. Pr., 359.*
3. A debtor cannot set up as a defence that the fund, to recover which he is sued, belongs not to the plaintiffs from whom he received it, but to third persons claiming adversely to them, unless such third persons will proceed to enforce their claim. *Supreme Ct., 1862, Lund a. Seaman's Savings Bank, 23 How. Pr., 258.*
4. In case of usury, the contracting party, in an action at law upon the contract, or in equity upon securities collateral to the contract, the owner of the property, or one having a valid lien upon it by mortgage or execution, is entitled to interpose the defence as a matter of strict right. *N. Y. Superior Ct., 1862, Chamberlain a. Dempsey, Ante, 241.*
5. A presumption of payment for the premises by one in possession under a contract to purchase, arising from lapse of time, cannot be interposed as an affirmative defence to an action to recover possession of the land. If it is so interposed, the fact upon which it proceeds must be affirmatively proved. [14 N. Y., 477.] *Supreme Ct., 1862, Brady a. Begun, 36 Barb., 533.*

ARREST, 4; COMPLAINT, 9; CONVERSION, 1; COUNTER-CLAIM; ESCAPE, 2; JOINT-DEBTOR; LIMITATIONS; MISNOMER; PLEADING; SET-OFF; STOCKHOLDER; UNDERTAKING, 3, 4; USURY.

DEMAND.

1. A judgment directed the defendant to execute a conveyance upon the written demand of the plaintiff. The plaintiff served a copy of the judgment with a written demand, and two months afterwards presented to the defendant a proper conveyance, and required its execution.

Held, that defendant's objection that the written demand was not served at the time of requiring the conveyance, was untenable. *N. Y. Superior Ct., 1862, Morris a. Walsh, Ante, 387.*

2. Where the defendant's attorney served a demand "that all papers be

DEPOSITION.

served on me at my office," specifying it;—*Held*, that the defendant was entitled to have a copy of the complaint served on him. *Supreme Ct., Sp. T.*, 1862, *Ferris v. Soley*, 23 *How. Pr.*, 422.

3. Where an account is payable in specific articles, upon the demand of the creditor, no action will lie upon the same for the recovery of money, nor can such account be used as a set-off, until after a demand and refusal to pay in the specified articles, and in the mode stipulated in the contract. *Supreme Ct.*, 1861, *Smith v. Tiffany*, 36 *Barb.*, 23.

COMPLAINT, 4; LIMITATIONS, 2, 3, 10.

DEMURRER.

1. A demurrer to a complaint for an excess of parties cannot be allowed; it is only in case of a deficiency of parties which appear on the face of the complaint that the demurrer will lie. *Supreme Ct., Sp. T.*, 1862, *Davy v. Betts*, 23 *How. Pr.*, 396.
2. A complaint is not demurrable for defect of parties defendant, at law, unless it appears thereby that some other party for whose non-joinder the demurrer is interposed is living at the time the action is commenced. The objection in such case must be taken by answer. [11 *How. Pr.*, 569; 1 *Hill*, 476; 6 *Ib.*, 135.] *Supreme Ct.*, 1862, *Scofield v. Van Syckle*, 23 *How. Pr.*, 97.
3. No one can demur for defect of parties to an action, unless his own interest requires that the defect should be cured. *Supreme Ct., Sp. T.*, 1862, *Newbould v. Warrin*, *Ante*, 80.
4. A complaint by a husband and wife, for a cause of action belonging exclusively to the wife, is demurrable, as stating no cause of action. *Supreme Ct.*, 1860, *Mann v. Marsh*, 35 *Barb.*, 68; *S. C.*, less fully, 21 *How. Pr.*, 372.
5. Whether, in such case, judgment should be rendered against both plaintiffs? *It seems*, that it should. *Ib.*
6. That facts constituting a defence, not a cause of action, are averred in an answer as a set-off or counter-claim, is not a ground of demurrer. *N. Y. Com. Pl., Sp. T.*, 1862, *Wait v. Ferguson*, *Ante*, 379.
7. A denial is not demurrable. *Supreme Ct.*, 1862, *Lund v. Seaman's Savings Bank*, 23 *How. Pr.*, 258.

DEPOSITION.

1. Referees appointed in controversy between debtor and his trustees, empowered to issue commissions in like manner as justices of the peace. *Laws of 1862*, 626, ch. 373, § 4; repealing 2 *Rev. Stat.*, 45, § 22.
2. Referees appointed in controversies respecting demands made by receivers

DISCONTINUANCE.

of mutual insurance companies, empowered to issue commissions, even before issue, like a justice of the peace. *Laws of 1862*, 743, ch. 412.

3. Whenever a default shall have been taken for want of any appearance or answer or other pleading in any action, and in any proceeding pending in any court of record, and whenever any issue of fact shall have been joined in any such action or proceeding, and it shall appear on the application of either party that any witness not residing in this State is material in the prosecution or defence of such action or proceeding, the court may, upon such terms as it shall think proper, award a commission to one or more competent persons, authorizing them or any one of them to examine such witness on oath, upon the interrogatories annexed to such commission; to take and certify the deposition of such witness, and return the same according to the directions given with such commission; but in all cases of default for want of appearance, no notice of such application shall be required to be served on the adverse party. *Laws of 1862*, 628, ch. 375, § 1.

REFERENCE, 11.

DISCHARGE.

1. An application for the discharge of a judgment-debtor from imprisonment on execution against the person,—under 2 Rev. Stat., 31, § 1 (amended, *Laws of 1847*, ch. 390, § 1),—must be made to the court. A judge out of court has no jurisdiction of such matter. *Supreme Ct., Chambers*, 1862, *Mather's Case*, *Ante*, 45.
2. Where it presumptively appears that an insolvent's discharge is void for any fraud, the court will deny a motion to set aside an execution issued against such insolvent, and direct issues triable before a jury to be framed to test the validity of the discharge. *N. Y. Com. Pl.*, 1862, *Stuart a. Salhinger*, *Ante*, 291.
3. The court will not try the validity of an insolvent's discharge on affidavits; and on motion the recitals of the discharge are conclusive. *Supreme Ct., Chambers*, 1862, *Manhattan Oil Co. a. Thorn* *Ante*, 291, *note*; *Wall a. Thorn*, *Ib.*, 292, *note*.

DISCONTINUANCE.

1. After a new trial has been granted, by the general term, on payment of costs, plaintiff will not be allowed by the special term to discontinue while the amount of the costs is in dispute and unpaid. *Supreme Ct., Sp. T.*, 1861, *North a. Sargeant*, *Ante*, 224.
2. The defendant, after being arrested and held to bail, moved to vacate the order of arrest; but before the motion was heard or the complaint served, the plaintiff obtained an *ex-parte* order discontinuing the action on payment of costs, and tendered the costs which are allowed before notice of trial; and defendant claimed costs of the motion to vacate

DISTRICT COURTS OF NEW YORK.

the order of arrest, and moved for leave to enter judgment of discontinuance.

Held, that defendant might enter judgment of discontinuance, unless plaintiff consented to withdraw the order of discontinuance, and to bring the motion to vacate the order of arrest to a hearing; but that on this motion the court could not determine his right to claim the costs of that motion. *Supreme Ct., Chambers*, 1860, *Crockett v. Smith*, *Ante*, 62.

JUDGMENT, 2.

DISCOVERY.

1. The fact that papers, sought to be discovered preparatory to trial, may be procured by subpœna *duces tecum*, served upon the adverse party, is not a conclusive answer to an application for an order for their discovery. But if the court see that obtaining the proof in that way is as practicable as by a discovery, the motion will be denied. *Supreme Ct., Chambers*, 1862, *Low v. Graydon*, *Ante*, 443.
2. On motion for discovery, the applicant is not required or expected to give an accurate description of the documents sought. The description need only be sufficiently precise to enable the party who is called on to produce, to know what is required. *Ib.*
3. On motion for discovery, in an action against an assignor, his assignee, and preferred creditors, to set aside the assignment, there is a presumption that such creditors have possession of the notes, to secure payment of which they are preferred, and which are shown to have been delivered to them. *Ib.*

DISMISSAL OF COMPLAINT.

1. Where the plaintiff assigned the demand in suit absolutely, the court, on the motion of the defendant, ordered that the complaint be dismissed unless the assignee should be substituted. *Supreme Ct., Sp. T.*, 1862, *Shearman v. Coman*, 23 *How. Pr.*, 517.
2. A dismissal of the complaint, taken by default, after the death of a sole plaintiff, but without notice of his death, is irregular, and will be set aside. *N. Y. Superior Ct., Chambers*, 1862, *Jarvis v. Felch*, *Ante*, 46.

JURISDICTION, 8; MARINE COURT, 2; PARTITION, 3.

DISTRICT COURTS OF NEW YORK.

1. Jurisdiction conferred upon the District Courts of the city of New York, of actions in which the People of this State are a party, where such actions

DISTRICT COURTS OF NEW YORK.

are brought by the overseers of the poor, or the commissioners of public charities, &c., in said city, upon bastardy or abandonment bonds, and the amount demanded or recovered does not exceed five hundred dollars; the pleadings and proceedings to be the same as in actions brought on bonds with conditions other than for the payment of money, and for any breaches of the condition of such bond, given in cases of bastardy, which happen after the recovery of any damages, or the commencement of any suit, the District Court in which the suit was originally brought shall have power to issue a new summons, and, upon the return thereof, to ascertain the amount of damages arising from said breach, and to give judgment accordingly; and in suits upon bonds given in abandonment cases, the justice holding such court shall have the same power as to requiring further security, or committing defendant in default thereof, as are now conferred by law upon the judges of courts of record in similar cases. *Laws of 1862*, 712, ch. 389, § 1; amending 1 *Laws of 1857*, 707, ch. 344.

2. An additional allowance of ten per cent. on the amount recovered in addition to costs may be allowed. *Ib.*, § 2.
3. Where the defendants, or either of several defendants, is not a resident of the city, the summons shall be returnable in not less than two nor more than four days from its date. Such summons shall be served at least two days before the day for appearance mentioned therein. When the plaintiff, or either of several plaintiffs, is not a resident of the city, the summons may be returnable as above provided, and if so returnable, it shall be governed by the above rule of service. *Laws of 1857*, 710, ch. 344, § 13, subd. 1; as amended by *Laws of 1862*, 975, ch. 484, § 20.
4. When the plaintiff does not reside in the city of New York, and has no place of business or of stated employment therein, or when the above is true of all the plaintiffs, before the issuing of the short summons as provided in subdivision 1 of section 13 of this act, there shall be filed with the clerk of the court a written undertaking, executed by one or more sureties, to the effect that if the defendant recovers judgment, such surety, or sureties, will pay all costs and extra costs that may be awarded to defendant, not exceeding one hundred dollars; if the defendant shall recover judgment in such case, and the execution thereon be returned unsatisfied, in whole or in part, the clerk shall deliver to the defendant such undertaking, to be prosecuted according to law. *Laws of 1857*, 710, ch. 344, § 13; as amended by *Laws of 1862*, 976, ch. 484, § 21.
5. By plaintiffs not residing in the city and county of New York, in the district in which the defendant, or one of the defendants, resides, and against a defendant, or defendants, not residing in said city and county, in the district in which the plaintiff, or one of the plaintiffs, resides; but where all the parties reside out of said city and county, the action may be brought in any district. Clause added to *Laws of 1857*, 710, ch. 344, § 4, by *Laws of 1862*, 976, ch. 484, § 22.
6. No person who shall have a place of business in the city of New York shall be deemed to be a non-resident under the provisions of this act. *Laws of 1862*, 976, ch. 484, § 23.
7. A justice of a District Court in the city of New York may on motion set aside a default in an action tried before him, and may award costs not exceeding ten dollars, as a condition. He may, likewise, as a condition, order the party, in default, to give an undertaking with sureties, not to sell, assign, or transfer any of his property with intent to hinder, &c., the plaintiff if he shall prevail, and to pay the amount of the judgment. *Laws of 1862*, 975, ch. 484, § 16.
8. Every summons, attachment, or warrant issued by a District Court of the

EJECTMENT.

city of New York must be served by a marshal, except that the justice on application of plaintiff or his attorney may designate some competent person to serve the summons and complaint in such action. *Laws of 1862, 974, ch. 484, § 14.*

ATTACHMENT, 4; JUSTICES' COURTS; MARINE COURT, 3, 4.

DIVORCE.

1. Divorces for adultery may be decreed where the marriage has been solemnized or has taken place within this State, or where the injured party at the time of the commission of the offence, and at the time of exhibiting the bill of complaint, shall be an actual inhabitant of this State. *2 Rev. Stat., 144, § 38, subd. 2; as amended, Laws of 1862, 446, ch. 246.*
2. No marriage shall be annulled on the ground of force or duress, if it shall appear that at any time before the commencement of the suit, there was a voluntary cohabitation of the parties, as husband and wife, nor on the ground of fraud, where there was such voluntary cohabitation with full knowledge of the facts constituting the fraud. *2 Rev. Stat., 143, § 31; as amended, Laws of 1862, 446, ch. 246.*
3. In an action for a divorce, the physical incapacity of the plaintiff to enter into the marriage relation is not, after two years from the date of the marriage, a defence. Under *2 Rev. Stat., 143*, upon failure to institute a suit within two years, to annul the marriage for physical incapacity, the marriage must be treated in all respects like one between parties in every respect competent to enter into that relation. *Supreme Ct., 1862, Griffin v. Griffin, 23 How. Pr., 183.*

ALIMONY; COUNTER-CLAIM, 3; EVIDENCE, 33.

EJECTMENT.

1. Every judgment in the action of ejectment rendered upon a verdict of a jury, or a report of a referee upon the facts, or upon the decision of a single judge upon the facts, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained. *2 Rev. Stat., 309, § 36; as amended by Laws of 1862, 977, ch. 485, § 1.*
2. The act amending the Revised Statutes in regard to judgments in actions of ejectment (*Laws of 1861, 538, ch. 221**) does not act retrospectively, so as to apply to judgments rendered prior to its passage. *Supreme Ct., 1862, Bay v. Gage, 36 Barb., 447.*

CAUSE OF ACTION, 4.

* Repealed by the Laws of 1862, 977, ch. 485, *q. v., supra*, 1.

ESTOPPEL.

ELECTION OF REMEDIES.

1. Whenever a vendor has manifested an intention not to rely on his lien upon the lands sold, for the purchase-money, he is considered to have waived his lien. Thus, where the vendor agrees to take, as a portion of the purchase-price, a conveyance of other property, and a deed of such property is executed by the vendee and delivered *in escrow*, the vendor's lien is lost. [Sugd. on Vend., 861; 1 Paige, 20.] *Supreme Ct.*, 1862, *Coit v. Fougere*, 36 *Barb.*, 195.
2. *It seems*, that if in such case the depository refuses to deliver the deed, the vendor's remedy is upon the agreement for the delivery of the deed. *Ib.*

ACTION, 5; JOINDER OF ACTIONS, 5.

ERROR.

Under the statute of 1852 (*Laws of 1852*, ch. 82), a writ of error lies from the Supreme Court as well as from the Court of Appeals. The statute embraces a judgment arising on demurrer. *Supreme Ct.*, 1862, *People v. Hartung*, 23 *How. Pr.*, 314.

FORMER ADJUDICATION, 6.

ESCAPE.

1. A sheriff who lets a prisoner, under an attachment for contempt, go at large on his executing a bond with one surety, is liable for an escape. *Supreme Ct.*, 1862, *Morton v. Campbell*, *Ante*, 410.
2. In a suit against the sheriff for the escape of a debtor, in his custody by virtue of a *ca. sa.*, and where the complaint is of the nature of a declaration in an action of debt, under 2 Rev. Stat., 437, § 63, the defendant cannot show the insolvency of the debtor in mitigation of damages. [4 *Bosw.*, 384, 391, 643.] *N. Y. Superior Ct.*, 1862, *McCreery v. Willett*, 23 *How. Pr.*, 129; affirming *S. C.*, 4 *Bosw.*, 643.

ESTOPPEL.

1. A party to an instrument for the payment of money, is not estopped by his mere refusal to pay it, based solely on the ground of inability, to a person then in possession thereof, from showing that it was not legally binding upon him. *Supreme Ct.*, 1860, *Van Ness v. Bush*, *Ante*, 33.
2. Those who execute an undertaking are estopped from contradicting

EVIDENCE.

its recitals to defeat the instrument. *N. Y. Com. Pl.*, 1861, Coleman *a. Bean*, *Ante*, 38.

3. Whenever the relation of landlord and tenant is made out in summary proceedings to recover the possession of demised premises, the tenant is estopped from disputing the title of his landlord. *Supreme Ct.*, 1862, People *a. Kelsey*, *Ante*, 373.

EVIDENCE.

I.—*Presumptions. Burden of Proof.*

1. On an indictment for seduction, under promise of marriage, the previous chaste character of the complainant is presumed until evidence impeaching it is produced. *Supreme Ct.*, 1861, People *a. Kane*, *Ante*, 15.
2. In regard to the performance of a lawful act, the presumption exists that at least ordinary care was used. *Supreme Ct.*, 1860, Lansing *a. Stone*, *Ante*, 199.
3. In an action brought to set aside an assignment for the benefit of creditors, on the ground that there was no actual or continued change of possession, the burden of proof as to that fact lies upon the plaintiff. *Supreme Ct., Sp. T.*, 1861, Dimon *a. Delmonico*, 35 *Barb.*, 554.

CONVERSION, 2; DISCOVERY, 3.

II.—*Records and Judicial Writings.*

4. Where an action was brought to have a mortgage decreed fraudulent and void, and to have the premises sold and the avails applied in satisfaction of a prior mortgage, and plaintiff became a purchaser of the contested mortgage, pending the action,—*Held*, that he became bound and concluded by the judgment as though he had been a party to the record, and that the judgment-record was legitimate evidence in a subsequent suit between plaintiff and the defendants in the former suit, to recover damages for fraud in the sale of the mortgage. [2 *Smith Lead. Cas.*, 552.] *Supreme Ct.*, 1862, Craig *a. Ward*, 36 *Barb.*, 377.
5. Act to amend an act of 1846 to perpetuate the evidence of the deaths of Nicholas Van Staphorst and others. *Laws of 1862*, 180, ch. 60.
6. A certified copy of a chattel mortgage is not admissible in evidence until the existence of the original is proved. *Supreme Ct.*, 1857, Fellows *a. Van Hying*, 23 *How. Pr.*, 230.

EVIDENCE.

7. The rule, excluding affidavits on account of unexplained alterations, does not apply to official documents, which have never been in the custody or under the control of the interested parties. In such a case, the presumption of fraud should not be indulged. *Supreme Ct.*, 1861, *Devoy v. Mayor, &c.*, of N. Y., 35 *Barb.*, 264; S. C., 22 *How. Pr.*, 226.
8. When the oath of a local officer is filed with the county clerk, a copy thereof, duly certified by such clerk, is admissible as evidence thereof. [1 *Rev. Stat.*, 5 ed., 411, 868.] *Ib.*
9. The record of any bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States, duly recorded in the office of the collector of customs where such vessel is registered or enrolled, or a transcript or copy thereof duly certified by said collector, may be read in evidence in any of the courts of this State, and in any judicial proceedings in this State, with the like force and effect as the original bill of sale, mortgage, hypothecation, or conveyance. *Laws of 1862*, 450, ch. 251, § 1.
10. In order to make a judgment-record evidence to conclude any matter, it should appear that such matter was in issue. *Supreme Ct.*, 1862, *People v. Johnson*, *Ante*, 416.

III.—Declarations ; Hearsay.

11. Declarations out of court are not to be construed as admissions, by the speaker, of any thing not within the popular meaning of the language employed. *Supreme Ct.*, 1862, *Lansing v. Stone*, *Ante*, 199.
12. The declaration of the maker of a note, that the same is paid, not made at the time of the transaction which constituted the payment, nor made in the presence of the holder, should not be received. *Supreme Ct.*, 1862, *Cronnse v. Fitch*, *Ante*, 347.
13. A conversation between copartners, to the effect that they will make a profit by purchasing a certain note, directly followed by their advancing the amount of the note to the holder, is admissible in their own favor, as proof of their intention in procuring the note, and to determine the character of the transaction. *Ib.*

IV.—Opinions of Witnesses.

14. The value of fruit-trees may be determined by the opinions of competent witnesses, and it is not necessary that the witness should have knowledge of the particular trees. It is enough if he is acquainted with the fruit business in that neighborhood, and of the value of similar property there. *Supreme Ct.*, 1862, *Whitbeck v. N. Y. Central R. R.*, 36 *Barb.*, 644.
15. In an action for an injury caused by a collision, it is error to inquire

EVIDENCE.

- of the witness as to whose negligence caused the collision. Such inquiries call for the opinions of the witness. *Supreme Ct.*, 1862, *Croft v. Brooklyn Ferry Co.*, 36 *Barb.*, 201.
16. The understanding of a witness as to the legal effect of a transaction, or of the intention of the parties, is properly excluded. *Supreme Ct.*, 1862, *Cronnse v. Fitch*, *Ante*, 347.
17. A witness may, in an action for a trespass upon the plaintiff's land, state his opinion of the amount of pecuniary damage, after having stated the actual injury done. *Supreme Ct.*, 1861, *Nellis v. McCarn*, 35 *Barb.*, 115.

V.—Particular Subjects.

18. Evidence that on two or three occasions, when the witness first called at the testator's place of business, he was told that the testator was out of town, and that there was no one else to represent him, and that subsequently he found there a person answering to the name, who said he was the man, and admitted the contract to be his, but refused to pay the money, is competent to go to a jury upon the question of identity, and sufficient to uphold a verdict in the absence of all evidence tending to raise any suspicion of mistake or collusion. [4 *Ad. & El.*, N. S., 626; 2 *C. & K.*, 744; 7 *N. Y.*, 270; 18 *Id.*, 86.] *N. Y. Superior Ct.*, 1856, *Howard v. Holbrook*, 23 *How. Pr.*, 64.
19. On an indictment for seduction under promise of marriage, under the Laws of 1848, ch. 111,—which constitute such an act a misdemeanor,—although an express promise on the part of the defendant ought to be proved, it is not necessary that there should be proof of an express promise on the part of the person seduced, in order to support defendant's promise. A promise on her part, if necessary at all, may be inferred from circumstances. *Supreme Ct.*, 1861, *People v. Kane*, *Ante*, 15.
20. *It seems*, that a promise on the part of the defendant alone, if express, is enough to sustain a conviction. *Ib.*
21. In actions brought for the killing of a dog, plaintiff must prove that the tax imposed upon such dog by the provisions of this act has been paid. *Laws of 1862*, 444, ch. 244, § 9.
22. Where, in an action to recover payment for services, the only issue joined is as to the employment of the plaintiff by the defendants, evidence of payment of the plaintiff by a third person is admissible, not as evidence of *payment*, but as showing that the plaintiff looked to such third person as his employer. *Supreme Ct.*, 1861, *Gilmore v. Atlantic & Pacific R. R. Co.*, 35 *Barb.*, 279.

EVIDENCE.

23. In an action against a sheriff for a false return upon an execution, the sheriff, on the trial, cannot go behind the execution to show that it was void, or voidable by reason of being irregularly and prematurely issued. *Supreme Ct.*, 1862, *Blivin v. Bleakley*, 23 *How. Pr.*, 124.
24. Where, on a trial for counterfeiting, hearsay evidence that defendant had been in possession of certain bills, was admitted without objection, —*Held*, that he was not precluded from objecting to the production of the bills in evidence, and proof of their identity. *Supreme Ct.*, 1862, *Cantor v. People*, 23 *How. Pr.*, 243.
25. In an action brought under the statute, by a husband, to recover damages for injuries causing the death of his deceased intestate wife, the jury in estimating the damages, cannot take into consideration the expectancy of the children of the deceased in the fruits of the earnings of the mother in a business which she carried on at the time of her death. The children could only realize such earnings as next of kin of their father, who would be legally entitled to them. But it may be competent for plaintiff to show the habitual occupation and employment of the deceased, for the purpose of showing her general capacity and relation to her family. *Ct. of Appeals*, 1862, *Tilley v. Hudson River R. R. Co.*, 23 *How. Pr.*, 363.
26. As to what are the pecuniary damages intended by the statute. *Ib.*
27. In an action by a sheriff to recover his fees for the execution of a warrant of attachment issued as a provisional remedy, the certificate of the justice who issued the warrant is conclusive evidence as to the amount of the sheriff's compensation. *Supreme Ct.*, 1862, *Birkbeck v. Stafford*, *Ante*, 285.
28. The fact that such certificate is made after the action to recover the sheriff's compensation is brought, does not alter its effect as evidence. *Ib.*
29. In an action to recover damages for fraud and deceit in concealing the defects of a horse purchased by plaintiff from the defendant, —*Held*, that on cross-examination of plaintiff, defendant might show that plaintiff had disposed of the horse, after owning it for a few months, at the price for which he bought it. *Supreme Ct.*, 1862, *Springstead v. Lawson*, *Ante*, 328.
30. Evidence of the price at which property, which has not materially deteriorated, sells at public sale, is admissible, to prove its value several months earlier. *Supreme Ct.*, 1862, *Cronnse v. Fitch*, *Ante*, 347.
31. Slight circumstances, where the benefit of a service is certain, will justify the finding of a request to do the work. *Supreme Ct.*, 1861, *Sinclair v. Tallmadge*, 35 *Barb.*, 602.
32. In an action against the indorser of a promissory note, where the de-

EXCEPTIONS.

fence was, that the circumstances under which the plaintiffs obtained the note amounted to a payment of it by them, for the benefit of the maker, proof that the maker had previously declared that he would borrow money from the plaintiffs to pay the note,—*Held*, inadmissible. *Supreme Ct.*, 1862, *Cronnse a. Fitch*, *Ante*, 347.

33. Parties seeking for a divorce must prove a full and complete case. Nothing is to be taken in favor of the applicant by presumption or intendment, as to the facts, even in the case of a default in answering or at the hearing. *Supreme Ct.*, 1861, *Linden a. Linden*, 36 *Barb.*, 61.
34. In an action of slander, on the question of the meaning and sense of the words proved, as understood at the time, all the conversation of the party at the time is admissible. *Supreme Ct.*, 1861, *Coleman a. Playsted*, 36 *Barb.*, 23.
35. In an action by a tenant against his landlord for damages to the furniture of the former, by negligently setting the leased premises on fire, evidence on behalf of the tenant that the landlord had obtained a policy of insurance on the premises, and received the amount mentioned therein, is properly rejected. *Supreme Ct.*, 1862, *Lansing a. Stone*, *Ante*, 199.
36. Evidence of fraud on the part of persons other than plaintiff, without his privity, in procuring the execution of the instrument sued upon, is properly rejected. *N. Y. Com. Pl.*, 1861, *Coleman a. Bean*, *Ante*, 38.

AFFIDAVITS; PLEADING, 12-15; WITNESS.

EXAMINATION OF PARTIES.

WITNESS.

EXCEPTIONS.

1. A general exception to a finding of mixed law and fact does not raise the question whether the fact found is sustained by the evidence. *Supreme Ct.*, 1862, *People a. Albright*, *Ante*, 305.
2. Section 174 of the Code authorizes the court to allow, in its discretion, exceptions to be served after the time prescribed by section 272 has expired. *Supreme Ct.*, 1862, *Bortle a. Mellen*, *Ante*, 228.
3. Where testimony, improperly excluded, is admitted at another stage of the trial, an exception to the exclusion becomes unavailable. *Supreme Ct.*, 1862, *Cronnse a. Fitch*, *Ante*, 347.
4. An exception that the judge at trial omitted to find a particular fact, is not available on appeal. The remedy is by motion to have it re-

EXECUTION.

ferred back to the judge for correction. *Supreme Ct.*, 1862, *People v. Albright*, *Ante*, 305.

APPEAL.

EXECUTION.

1. A. being indebted to B., joined with other parties in the formation of a manufacturing corporation, which became indebted to C. On execution against A., upon his debt to B., some property manufactured and owned by the corporation was seized and sold to B., and afterwards taken from him on execution against the corporation for the debt of C. *Held*, that the first seizure was unlawful, and the latter lawful. *Supreme Ct.*, 1861, *Booth v. Bunce*, 35 *Barb.*, 496.
2. *Held*, also, that it was immaterial whether the corporation was organized for the purpose of defrauding the creditors of A. or not, as even if it was, the fact could not affect the rights of an innocent creditor in due course of business, which C. appeared to be. *Ib.*
3. Where an execution against property omitted to give the judgment-debtor credit for a payment which had been previously made upon the judgment, and real property was sold under the execution, but for a sum less than the amount actually due upon the judgment,—*Held*, that the execution was not void by reason of the omission, and that the purchaser's rights under the sale were not to be disturbed. *Supreme Ct.*, *Chambers*, 1861, *Peet v. Cowenhoven*, *Ante*, 56.
4. An execution cannot be issued upon a judgment which has been satisfied by the filing of a certificate, as prescribed by 2 Rev. Stat., 362. If the satisfaction is voidable for any cause, it must be vacated by the court before execution can be issued. *Supreme Ct.*, 1862, *Ackerman v. Ackerman*, *Ante*, 229.
5. The exemption of homesteads, as provided by the act of 1850 (*Laws of 1850*, ch. 260), is from sale on execution only, and does not exempt the property from being bound and charged by a judgment; and a waiver of the exemption leaves the property liable to be sold on any execution which may be issued upon the judgment, the same as though no exemption had ever existed. It removes the only obstacle to the complete enforcement of the lien created by the judgment. *Supreme Ct.*, 1862, *Smith v. Brackett*, 36 *Barb.*, 571.
6. The judge charged that if any part of the judgment was recovered for the purchase-price of articles exempt from levy and sale on execution, under *Laws of 1842*, ch. 157, the sheriff might levy on any other exempt article to the amount of the purchase-price of such articles.

Held, 1. That this was erroneous. The execution must follow the

EXECUTION.

- property sold, as if the plaintiff retained a specific lien thereon for the price. The statute does not give the vendor a right to take any *other* exempt property for his debt. 2. That where plaintiff takes a judgment for the price of the exempt property, together with other debts, he is deemed to have elected to abandon his claim to follow the specific property. [17 How. Pr., 517; 32 Barb., 83; 2 N. Y., 262; 7 Hill, 182.] *Supreme Ct.*, 1861, *Hickox v. Fay*, 36 Barb., 9.
7. The exemption of homesteads from sale on execution (*Laws of 1850*, ch. 260) is a mere personal privilege, which the statute secures to the debtor, and to his widow and children after his decease, which does not run with the land, and which cannot be transferred to another, with the land. *Supreme Ct.*, 1862, *Smith v. Brackett*, 36 Barb., 571.
 8. Under section 282 of the Code, as amended in 1862, no execution against the person can issue, unless an order of arrest has been served, or the complaint contains a statement bringing the case within section 179 of the Code. *N. Y. Superior Ct.*, *Chambers*, 1862, *Purchase v. Bellows*, *Ante*, 357.
 9. On a judgment in an action to compel the delivery of specific personal property, an execution against the person can be issued only when the defendant has been arrested under section 179 of the Code. *Ib.*
 10. Where judgment was recovered by the plaintiff in an action to set aside a conveyance, fraudulent as to creditors; and, on the return, unsatisfied, of an execution against property issued to collect from the grantee in the conveyance, money directed by the judgment to be paid, the plaintiff issued execution against the person without leave of the court;—*Held*, irregular. *Supreme Ct.*, 1862, *Fassett v. Tallmadge*, *Ante*, 188.
 11. Where the defendant has been arrested in an action in which the Code authorizes his arrest, and upon giving security to the plaintiff's attorney for the claim in suit, he is by the consent of the latter released from arrest, before judgment, he is still liable to final process against his person, on the judgment. The consent to release the defendant from arrest, does not operate as a vacation or discharge of the order of arrest. At most it is to be regarded in the light of a voluntary escape, or like the entry of common bail under the old practice. And a discharge or an escape, voluntary or otherwise, from arrest upon mesne process, never precluded a subsequent arrest upon final process. *N. Y. Superior Ct.*, *Sp. T.*, 1862, *Meech v. Loomis*, *Ante*, 428.

CREDITOR'S ACTION, 2; DISCHARGE; EVIDENCE, 23; PROCESS;
SHERIFF, 1-4.

EXECUTORS AND ADMINISTRATORS.

1. Where an intestate dies, unmarried, but leaving a father and brothers, the surrogate has no right, upon the father's renouncing the administration, to pass over the brothers, and appoint a creditor of the deceased as administrator. He has not a discretionary power to pass over the next of kin. [Overruling 1 Bradf., 100.] *Supreme Ct.*, 1860, *Lathrop v. Smith*, 35 *Barb.*, 64.
2. An executor appointed in another State in the case of a testator domiciled there, although he may take out ancillary letters in the Surrogates' Courts of this State, to reach assets here, can be compelled to account here, at the instance of a beneficiary under the will, only for such assets as the testator left in this State, and which were here at the time when the letters ancillary were granted. With respect to all other assets he is to account in the jurisdiction of the principal administration. *N.Y. Surrogate Ct.*, 1862, *Coley's Estate*, *Ante*, 461.
3. There may, however, be exceptions to this rule,—*e. g.*, where the bulk of the estate is within the jurisdiction of ancillary administration, the will is clear, the debts are paid, and it is apparent that no injury could arise. *Ib.*
4. An executor who has obtained probate and letters in a sister State, where the testator was domiciled and died, and where the executor resides, can dispose of personal assets situated in this State, without taking out letters ancillary here; although such ancillary letters would be necessary to enable him to sue here. *Supreme Ct.*, *Sp. T.*, 1862, *Middlebrook v. Merchants' Bank*, *Ante*, 462.
5. Under 2 Rev. Stat., 89, 90,—which authorizes a reference of claims against the estates of deceased persons, by agreement between the claimant and the personal representative,—the court have no power to order judgment against the report of the referee. Either the report must be confirmed, and judgment ordered thereon, or it must be set aside; in which case a new trial follows before the same referees or others appointed in their places. *Supreme Ct.*, 1861, *Coe v. Coe*, *Ante*, 86.
6. *It seems*, that these proceedings cannot be deemed a civil action under the Code, but must be governed, to some extent, by the analogy of the former practice. *Ib.*
7. The provisions of the act of 1837 (*Laws of 1837*, 529, ch. 460, §§ 25–33, 36),—which relate to proceedings in the case of insolvent sureties of an executor or administrator, to the release of sureties, and to the effect of revocation of letters,—amended. *Laws of 1862*, 417, ch. 229, §§ 25–33, 36.

FORMER ADJUDICATION.

FORECLOSURE.

1. A regular foreclosure by advertisement, and the sale made in pursuance thereof to a *bona-fide* purchaser, is equivalent to a sale under a decree in a court of equity, and is an entire bar of all claim of any person having a judgment lien subsequent to the mortgage, who shall have been served with notice of sale. [2 Rev. Stat., 546, § 8; Laws of 1844, ch. 346, § 4.] *Supreme Ct.*, 1862, Warner *a.* Blakeman, 36 *Barb.*, 501.
2. Stockholders of railroad and plank-road companies authorized to make payments upon mortgages in process of foreclosure against such companies. *Laws of 1853*, 966, ch. 502.

JUDGMENT, 5; JUDICIAL SALE.

FOREIGN CORPORATION.

1. A foreign corporation may sue in the courts of this State; and though bound to give security for costs, the filing of such security is not a condition precedent of its right to sue. *N. Y. Superior Ct., Sp. T.*, 1862, Persse & Brooks' Paper Works *a.* Willet, *Ante*, 119.
2. Their omission to file such security at the commencement of the action is merely an irregularity. *Ib.*

JURISDICTION, 4; LIMITATIONS, 15; PLACE OF TRIAL; SECURITY FOR COSTS, 2.

FORMER ADJUDICATION.

1. A matter once considered and decided by a competent tribunal, cannot be reviewed by any other tribunal having concurrent power, except in the regular course of error or appeal. [1 Johns., 98; 7 Id., 286.] *Supreme Ct.*, 1861, Hyatt *a.* Bates, 35 *Barb.*, 308.
2. This principle applies to tribunals having only a special and local jurisdiction, as well as to any others. *Ib.*
3. A judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. *Supreme Ct.*, 1862, People *a.* Johnson, *Ante*, 416.
4. Facts found by a former decree, which are not necessary to uphold the decree, do not conclude the parties. *Ib.*
5. Where a plaintiff had two judgments against the same defendant, upon each of which execution had been issued, and the court, after hearing the parties, had decided that the sum realized under the exe-

FRAUD.

- cution was properly applicable to one of the judgments,—*Held*, that such order was conclusive upon the parties unless reversed on appeal. *Supreme Ct., Chambers*, 1861, *Peet v. Cowenhoven*, *Ante*, 56.
6. The rule that if a judgment is reversed for errors in the record, that is, because it is in itself erroneous, a plea of it as a former conviction or former acquittal is of no avail, applies to a case where the judgment was reversed because a new statute had repealed the statute under which the conviction was had. *Supreme Ct.*, 1862, *People v. Hartung*, 23 *How. Pr.*, 314.
 7. The same proof, required in an equitable suit to establish a will as a lost or destroyed will, is necessary in an action of partition between the same parties, when the same will is sought to be established. *Supreme Ct.*, 1861, *Harris v. Harris*, 36 *Barb.*, 88.
 8. And the question having been passed upon, in the first suit, by a competent tribunal, must be deemed at rest, and the former judgment conclusive. *Ib.*
 9. That a former judgment of the same court, or of a court of concurrent jurisdiction, directly upon the point in issue, is, as a plea in bar or evidence, conclusive between the same parties, upon the same matter in a subsequent proceeding; and not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to the subject-matter of the litigation, or coming within the legitimate purview of the original action, both as to matters of claim and of defence. [2 *Barb.*, 586; 3 *N. Y.*, 511, 522; 5 *Ib.*, 357; 12 *Ib.*, 184; 34 *Barb.*, 156.] *Ib.*

EJECTMENT; EVIDENCE, 4, 10; MOTIONS AND ORDERS, 15.

FRAUD.

1. A debtor cannot use the power he has of assigning his property preferentially, to intimidate creditors into abstaining from pursuing the remedies allowed by law to collect debts, without being chargeable with intent to defraud them. *N. Y. Superior Ct., Chambers*, 1861, *Gasherie v. Apple*, *Ante*, 64.
2. In an assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the debtor or his assignees, the reservation of the surplus to the debtor is not evidence of a fraudulent intent towards other creditors. *Supreme Ct.*, 1862, *McClelland v. Remsen*, *Ante*, 331.

ARREST, 3; ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; EVIDENCE, 36.

HIGHWAYS.

GUARDIAN.

In proceedings in partition, it is erroneous to allow an infant to act by guardian without security. *Supreme Ct., Chambers*, 1861, *Clark a. Clark, Ante*, 299.

HIGHWAYS.

1. Under 1 Rev. Stat., 514, § 58, which requires a consent on the part of the owner or occupant of cultivated lands to the laying out of a highway through his land, a verbal consent is sufficient. *Supreme Ct.*, 1862, *People a. Albright, Ante*, 305.
2. In proceedings instituted by a commissioner of highways, under Laws of 1847, ch. 455, for a reassessment of the damages of a landowner whose land has been taken, such owner is entitled to notice of the time and place of impanelling the jury, and of the proceedings before the jury. *Supreme Ct.*, 1862, *People a. Tallman*, 36 *Barb.*, 222.
3. The right of appeal to the county judge, from an order of the commissioners of highways, is given to every person who may feel himself aggrieved thereby; provided he be a resident taxpayer of the town, and as such liable to assessment therein for highway labor. It was not the intention of the Legislature to restrict the right to the applicants for the road, and those over whose lands it is proposed to lay it. *Supreme Ct.*, 1862, *People a. Cortelyou*, 36 *Barb.*, 164.
4. It is the duty of referees appointed to hear and determine an appeal from an order of the commissioners of highways, to hear the proofs and allegations of the parties, and make a determination which should reverse or affirm the order of the commissioners. They have no power to dismiss the appeal. *Ib.*
5. The referees appointed by the county judge under 1 Rev. Stat., 518 (modified by Laws of 1847, ch. 455), to determine appeals from the determination of commissioners of highways, may hear and decide the appeal on facts existing at the time of the hearing before them as upon the facts existing at the time of the original application; and in case of reversing the decision of the commissioners, they may make such order as in their judgment the commissioners should have made. *Supreme Ct.*, 1862, *People a. Albright, Ante*, 305.
6. There can be no proceedings by commissioners of highways, for an encroachment upon a highway, in a case where the highway has not been laid out and recorded in conformity with the directions of the highway act, even though such road has been used as a public high-

INJUNCTION.

way for twenty or more years. *Supreme Ct.*, 1862, *Doughty v. Brill*, 36 *Barb.*, 487.

7. Proceedings upon the hearing of a complaint for an encroachment, under 1 Rev. Stat., 522, regulated; and the nature of the judgment, mode of enforcing, of appealing from it, and of the determination of the appeal, prescribed. *Laws of 1862*, 440, ch. 243.

ACTION; APPEAL, 29; CERTIORARI, 1; JUSTICES' COURTS.

INDICTMENT.

"It shall not be necessary in an indictment against any person or persons, for an offence committed against the rights or property of any joint-stock association organized under the statutes of this State, to set forth the names of the members of such association, nor to prove the same on the trial of such indictment, but it shall be sufficient to set forth in such indictment the name assumed and used by such association in its business, and to prove the same on the trial accordingly." *Laws of 1862*, 318, ch. 151, § 1.

EVIDENCE, 1, 19, 24.

INJUNCTION.

1. A covenant in partnership articles, prohibiting either partner from continuing in any business within one block of the premises occupied by the firm, for a limited period after its dissolution, will be enforced by injunction. *N. Y. Com. Pl., Sp. T.*, 1862, *Shearman v. Hart*, *Ante*, 358.
2. An injunction should not require the performance of any act, but only forbid performance. *Supreme Ct., Sp. T.*, 1861, *Ward v. Kelsey*, *Ante*, 106.
3. Where the plaintiff's title to land is disputed on no other ground than that he has dedicated the land to public use, and under such claim of right, the defendant has repeatedly torn down fences erected by the plaintiff, and travelled over the plaintiff's land, an action may properly be brought for an injunction to restrain the defendant from such acts. [21 *N. Y.*, 474; 23 *Barb.*, 103.] *Supreme Ct.*, 1861, *Carpenter v. Gwynn*, 35 *Barb.*, 395.
4. When a lease made by a municipal corporation pursuant to a sale for an unpaid assessment is, by law, evidence of the regularity of the sale, the court in cases of substantial irregularity will restrain the making of such lease. *Supreme Ct., Sp. T.*, 1862, *Matthews v. Mayor, &c.*, of *N. Y.*, *Ante*, 209.
5. On a motion for an injunction, plaintiff may put in affidavits in contradiction or explanation of any new matter introduced by the de-

JOINDER OF ACTIONS.

fence; but the defence may, during the proceedings, further answer the additional affidavits. *Supreme Ct., Sp. T., 1862, Davis a. Hackley, Ante, 64, note.*

6. The fact that a demurrer to the complaint, as not stating facts sufficient to constitute a cause of action, has been sustained by the court, is a conclusive answer to a motion upon the complaint for an injunction and receiver. *Supreme Ct., Chambers, 1861, Mowbray a. Lawrence, Ante, 160.*
7. An injunction will not be granted, before judgment, for any purpose which can be attained by other ordinary process of the law. *Supreme Ct., Sp. T., 1861, Ward a. Kelsey, Ante, 106.*
8. Courts of record in the city of New York, having equitable jurisdiction, may enjoin violation of fire laws. *Laws of 1862, 592, ch. 356, § 38.*

PROHIBITION, 5; SUMMARY PROCEEDINGS, 9.

INSURANCE (AND INSURANCE COMPANIES).

1. Wager policies of fire insurance are void at common law, irrespective of any statute. *Supreme Ct., 1862, Freeman a. Fulton Fire Ins. Co., Ante, 398.*
2. Though no recovery can be had on a premium or deposit note, unless it has been duly assessed [19 N. Y., 32], the plaintiff may allege and prove that the note, notwithstanding its form, was given and taken as and for a capital-stock note, and used as such in organizing the insurance company, and recover the entire amount thereof, without showing that it has been assessed; because such notes are payable absolutely at maturity. [16 N. Y., 310.] *Supreme Ct., 1862, Sands a. St. John, 36 Barb., 628.*

COMPLAINT, 6; SERVICE, 1, 2.

IRREGULARITIES.

MOTIONS AND ORDERS, 3, 4.

JOINDER OF ACTIONS.

1. The causes of action arising out of the same transaction, under § 167 of the Code, must be consistent with, not contradictory to each other. *Supreme Ct., 1862, Springsteed a. Lawson, Ante, 328.*
2. Thus, a cause of action for fraud and deceit in concealing the defects of a horse purchased by plaintiff, cannot be united with a cause of action for breach of a warranty of soundness given on the sale. *Ib.*

JUDGMENT.

3. Damages to land cannot be sued for and recovered until after plaintiff has recovered possession of the land held adversely by defendant. A claim for such injuries cannot be united with a claim to recover the land. [18 Barb., 496; 19 Ib., 560; 12 Johns., 183; 1 Ib., 511; 4 Cow., 529; 8 Wend., 58; 19 Ib., 507.] *Supreme Ct.*, 1862, *Hotchkiss v. Auburn & Rochester R. R. Co.*, 36 Barb., 600.
4. Under the Code of Procedure, a widow suing to recover her dower may unite in the same complaint a demand for an account and payment of the rents and profits. *Supreme Ct.*, 1861, *Van Name v. Van Name*, 23 How. Pr., 247.
5. The Code (§ 167) allows a plaintiff to unite a claim to recover real property with a claim for damages for withholding the same, and for the rents and profits, but this provision gives no new rights of action, and plaintiff is not bound to elect as between those causes of action, which he will go for. *Supreme Ct.*, 1862, *Hotchkiss v. Auburn & Rochester R. R. Co.*, 36 Barb., 600.

ACTION, 1; ARREST, 5.

JOINT-DEBTORS.

Where a judgment has been recovered against joint-debtors, under a service of process upon one only, it is not a valid defence to an action upon the judgment, that the party served with process in the former action is not joined as a defendant. *N. Y. Com. Pl.*, 1862, *Johnson v. Smith*, *Ante*, 421.

LIMITATIONS, 12; SUMMONS, 3.

JUDGE.

The judge of the tribunal of conciliation established by this act, may make orders, and exercise, within said sixth judicial district, the powers of a justice of the Supreme Court, out of court and at chambers, according to the existing practice, except to stay proceedings in Supreme Court after verdict. *Laws of 1862*, 816, ch. 451, § 10.

JUDGMENT.

1. Where a jury has rendered a verdict in favor of the plaintiff for the return of personal property, and assessed the value of the property at less than \$50, but has awarded no damages for the detention, the defendant cannot enter judgment for costs until the plaintiff has, by laches, lost his right to correct the judgment. *N. Y. Superior Ct.*, 1862, *Von Schoening v. Buchanan*, *Ante*, 185.

JUDGMENT.

2. A discontinuance is a final determination of the rights of the parties in an action, within the meaning of § 245 of the Code. *Supreme Ct., Chambers*, 1860, *Crockett v. Smith*, *Ante*, 62.
3. A judgment against a non-resident, since it can be recovered only where he has property in this State, is limited in its effect to the property which the defendant has in this State, and does not have the effect of a judgment *in personam*. Three things are essential to give the court jurisdiction: first, that the defendant is a non-resident; second, that he has property here; and third, that he could not, after due diligence, be found within the State,—which, taken together, show that the design was to enable a person who has a cause of action against a non-resident, whom he cannot serve with process, to obtain the satisfaction of his claim out of the property of the non-resident situated here. For this purpose he is permitted to recover a judgment by the service of the summons by publication, and by the deposit of a copy of it directed to the defendant, if his residence is known, under which the plaintiff may reach by execution any property of the defendant in this State. Provision is made for allowing the defendant to defend after judgment, and if the defence is successful, and the judgment, or any part of it, has been collected, empowering the court to compel restitution. These provisions denote the nature of the judgment, that it does not possess the exclusive character of judgments founded upon personal service of process, and import absolute verity; nor is it a conclusive adjudication of the rights of the parties. *N. Y. Com. Pl.*, 1862, *Force v. Gower*, 23 *How. Pr.*, 294.
4. On a trial by the court without a jury, the failure of the judge to specify the relief granted, or the determination of the action, is an irregularity of which advantage may be taken, even on appeal from the judgment. *N. Y. Superior Ct.*, 1862, *Chamberlain v. Dempsey*, *Ante*, 241. To the contrary is *Sharp v. Wright*, 35 *Barb.*, 236.
5. In foreclosure-actions under the Code of Procedure, the judgment may provide as under the former practice, that if the moneys arising from the sale are insufficient to pay the amount reported due to the plaintiff, with the interest and costs, that the officer making the sale specify the amount of such deficiency in his report of the sale, and on the coming in and confirmation of the report, the defendant pay to the plaintiff the amount of such deficiency, with interest, &c., and that the plaintiff have execution therefor; and, where the judgment is in this form, and there proves to be a deficiency, no application to the court is necessary, either for confirmation of the report (Rule 32), or for leave to issue execution. *Supreme Ct., Sp. T.*, 1862, *Bicknell v. Byrnes*, 23 *How. Pr.*, 486.

JUDICIAL SALE.

6. In a decree setting aside the deed of a judgment-debtor, as fraudulent and void as against creditors, the court has no power to insert a provision directing a sale of the premises as in the case of a sale upon execution, for the purpose of paying the judgment-debt. *Supreme Ct.*, 1861, *Walker v. White*, 36 *Barb.*, 592.
7. A judgment obtained in an action brought to have a deed declared to be merely a mortgage, which declares it to be a deed and not a mortgage, although it also declares that the grantor is tenant of the grantee, is not evidence on this latter question. *Supreme Ct.*, 1862, *People v. Johnson*, *Ante*, 416.
8. It is no excuse for refusing to execute a conveyance directed by a judgment of court that there is no person present to become subscribing witness, or commissioner to take the grantor's acknowledgment, or that there is no seal attached to the instrument. *N. Y. Superior Ct.*, 1862, *Morris v. Walsh*, *Ante*, 387.
9. A judgment against the owner of homestead premises will have priority over a mortgage, subsequently executed by him as a lien upon the premises. *Supreme Ct.*, 1862, *Smith v. Brackett*, 36 *Barb.*, 571.
10. The recovery of a judgment in an action for fraud merges and extinguishes the original ground of action. And this rule applies as well to a foreign as to a domestic judgment; and an action upon such judgment is an action upon contract, and not for fraud, so that in such action the defendant cannot be arrested under subdivision 1 of section 179 of the Code. *Supreme Ct.*, *Sp. T.*, 1862, *Mallory v. Leach*, *Ante*, 449, *note*.
11. Judgment for violation of fire laws in New York; and mode of enforcing removal of building by precept before judgment. *Laws of 1862*, 592, ch. 456, § 38.

AMENDMENT, 2, 3; APPEAL, 5, 6, 17, 19; CITY COURT OF BROOKLYN; CLERK; CONTEMPT, 1, 2; CREDITOR'S ACTION, 1; EJECTMENT; EXECUTION, 4; EXECUTORS AND ADMINISTRATORS, 5; FORMER ADJUDICATION; JUSTICES' COURTS; REFERENCE, 3, 5-7, 9.

JUDICIAL SALE.

1. A mortgagor by including several parcels in the same mortgage does not authorize all to be sold in one lot. *Supreme Ct.*, *Sp. T.*, 1862, *Wolcott v. Schenck*, 23 *How. Pr.*, 385.
2. That a judicial sale is within the Statute of Frauds, and subscription by the officer of the memorandum of sale is necessary to make the sale

JUDICIAL SALE.

- valid. *Supreme Ct., Sp. T., 1862, Bicknell a. Byrnes, 23 How. Pr., 486.*
3. If a judicial sale is within the Statute of Frauds at all [1 Ves., 221; 12 Ib., 472], the written certificate of the referee, or the memorandum of the auctioneer, employed by him, is sufficient to bind the purchaser of land thereat. [11 Paige, 431.] *Supreme Ct., 1861, Hegeman a. Johnson, 35 Barb., 200.*
 4. A paper signed by defendant on becoming a purchaser at a sheriff's sale, under a judgment, by which he agreed to comply with the conditions of sale,—*Held*, not a contract, either with the sheriff or the plaintiff in that action; and no action could be maintained thereon. *Supreme Ct., 1862, Miller a. Collyer, 36 Barb., 250.*
 5. That when a sale, valid by the Statute of Frauds, is made, but is not binding for some other sufficient reason, it is the duty of the officer to insist on performance by the purchaser, leaving him to obtain relief from the court. *Supreme Ct., Sp. T., 1862, Bicknell a. Byrnes, 23 How. Pr., 486.*
 6. Purchasers at a sheriff's sale have no claim to be indemnified, and they purchase no greater interest than the sheriff can rightfully sell. And the sheriff cannot warrant the title. *Supreme Ct., 1862, Ball a. Pratt, 36 Barb., 402.*
 7. If by the terms of sale the money is to be paid down, and the purchaser does not on demand pay the money, the officer may at once proceed and offer the premises again for sale. But if the day is permitted to pass without adjournment, and the purchaser neglects to complete his purchase, the officer may proceed and readvertise and resell the premises as if no sale had been made, or may insist upon its validity, and sue for the purchase-money. When the time for selling pursuant to notice has passed, and no valid sale has been made, or, if valid, the party elects to disregard it, he cannot again sell without the authority of the court, unless he again advertise the sale. But if he gives a second notice of sale, and a second sale is had in conformity to the rules regulating such sales, it is valid. *Supreme Ct., Sp. T., 1862, Bicknell a. Byrnes, 23 How. Pr., 486.*
 8. Where, upon sale in foreclosure, a junior mortgagee bids off the mortgaged premises, the court will not order the sheriff to give a deed to the purchaser until the whole of the purchase-money has been paid in, although a portion of the money which is not paid in may belong to the purchaser as surplus money, and have to be shortly returned to him. The inconvenience of compelling a party to pay in money which is to be shortly after repaid to him, does not in general afford a sufficient ground for departing from the ordinary practice. Especially this

JUDICIAL SALE.

- should not be done where there are additional parties who, for aught that appears, may have liens on the surplus, superior to the applicant. *Supreme Ct.*, 1861, *Battershall v. Davis*, 23 *How. Pr.*, 383.
9. That the remedy against a purchaser under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it, or to resell the property and hold him liable for the loss and the additional expenses. *Miller v. Collyer*, 36 *Barb.*, 250.
 10. A purchaser at a sale by order of court will not be required to complete his purchase, in case of reasonable doubt as to the validity of the title acquired. *Supreme Ct.*, 1862, *Matter of Cavanagh*, *Ante*, 258.
 11. Where a purchaser at a judicial sale was discharged by reason of a doubtful title, the petitioners were ordered to pay the costs and expenses of the purchaser, and that such costs and expenses, on being ascertained, should be charged upon the petitioner's interest in the land, and that the purchaser have execution therefor. *Supreme Ct., Chambers*, 1862, *Matter of Cavanagh*, *Ante*, 261, *note*.
 12. Where the purchaser of land at a foreclosure-sale, on receiving arrears of interest, with costs, and expenses of foreclosure, allowed the defendant to continue in possession, under a parol agreement that the defendant should occupy the land so long as he paid taxes, assessments, and interest on the mortgage-debt,—*Held*, that the purchaser had at least a valid lien upon the land, which would pass by grant, and which could not be impeached by a subsequent creditor of the defendant in the foreclosure. *Supreme Ct., Sp. T.*, 1861, *Spicer v. Hunter*, *Ante*, 4.
 13. The fact that after a sale in foreclosure the purchaser conveyed the land before confirmation of the report of sale, or the fact that there was a surplus and that there are judgment-creditors who claim it, is no ground for refusing to order a resale. *Supreme Ct., Sp. T.*, 1862, *Wolcott v. Schenck*, 23 *How. Pr.*, 385.
 14. When the mortgaged premises consisted, at the time of the mortgage as well as at the time of the sale, of several parcels distinctly marked by separate use, it is the duty of an officer of the court conducting a sale to sell them separately, unless in the very special cases intended to be provided for in the last clause of Rule 74. And where the referee has been requested to conduct the sale in such a manner, and declined to do so, it is a sufficient reason for ordering a resale, unless it be shown that the case comes clearly within that exception. The presumption is, that a sale in parcels will be most advantageous, and the contrary must be made to appear to sustain a sale in bulk in such a case. [Distinguishing *Lamerson v. Marvin*, 8 *Barb.*, 9; *Hyland v. Stafford*, 10 *Barb.*, 557; *Griswold v. Fowler*, 24 *Ib.*, 135.] *Ib.*
 15. Where a foreclosure-sale is fraudulent and void, as to judgment-cred-

JURISDICTION.

itors, the court, in setting it aside, will not disturb the title of a *bona-fide* purchaser, in favor of the claims of a junior creditor, to upset the sale on the ground of fraud, *Supreme Ct.*, 1862, *Warner v. Blake-man*, 36 *Barb.*, 501.

EXECUTION, 3 ; JUDGMENT, 5, 6.

JURISDICTION.

1. Jurisdiction defined, as the power to act judicially to determine any question presented in a controversy between parties. *King v. Poole*, 36 *Barb.*, 242.
2. When there is a want of jurisdiction, arising from the omission to prove certain essential facts, which the statute requires to be proven to any special tribunal or magistrate as a ground for issuing process, the proceeding will be held void in whatever form the question may arise. But when jurisdiction has been once acquired, any mistake by the magistrate, or tribunal, concerning the proof or evidence submitted in the course of the proceeding, or the weight or importance which should be attached to such proof, only renders the act erroneous, and the proceeding will stand good until reversed. In the one case there is a defect of jurisdiction, and the tribunal acts without authority ; in the other, there is but an error of judgment upon a question properly before it for adjudication, and in such a case the final process will be held valid until set aside by a direct proceeding for that purpose. [4 *Hill*, 598 ; 1 *Den.*, 537 ; 11 *Johns.*, 175 ; 10 *Wend.*, 420 ; 4 *Den.*, 118.] A proceeding, regular in form, before a magistrate expressly authorized by statute to entertain it, cannot be examined into collaterally by another judge and disregarded, because from certain facts appearing before him, and which were not presented to the magistrate, he is of opinion that the proceeding was not instituted by the proper party. *N. Y. Com. Pl.*, 1862, *Imbert v. Hallock*, 23 *How. Pr.*, 456.
3. A court possesses power and jurisdiction to determine whether it has authority to entertain a particular controversy, although its decision and the law be that it has no such authority, and it therefore dismisses the suit. Such a question may be presented by a demurrer, and its decision must be a judgment. *Supreme Ct.*, 1862, *King v. Poole*, 36 *Barb.*, 242.
4. Where parties (one of whom being a foreign corporation), making a contract out of the State, contemplate its performance in the State, the cause of action arises here, and the court has jurisdiction. *Supreme Ct.*, 1862, *Connecticut Mutual Life Assurance Co. v. Cleveland, &c., R. R. Co.*, 23 *How. Pr.*, 180.

JUSTICES' COURTS.

5. Since the Constitution and laws of the United States prohibit the State courts from taking cognizance of suits affecting consuls, a State court has no jurisdiction to grant process against a consul, in an action in which he is named as a defendant. *Supreme Ct., 1862, Rock River Bank a. Hoffman, Ante, 72.*
6. Process so granted being invalid, a revocation of the *exequatur* of the consul, after the commencement of the suit, is no answer to a motion to dismiss the action and vacate the process. *Ib.*
7. The fact that the consul is sued, with others, upon the joint liability of all, does not alter the case. The United States courts have jurisdiction in such case; and the State court cannot allow the consul's name to be struck out and the action to proceed against the other defendants. *Ib.*
8. An action for equitable relief, where the matter in dispute does not exceed fifty dollars, will be dismissed. *Supreme Ct., Chambers, 1862, Sarsfield a. Van Vaughner,* Ante, 297.*
9. Where a plaintiff severs and releases a portion of his claim in order to bring his cause within the jurisdiction of an inferior court, such severance and reduction should not be deemed a fraud upon the courts of higher jurisdiction so far as to authorize a writ of prohibition. *Supreme Ct., Chambers, 1861, People a. Marine Court of N. Y., Ante, 266.*
10. It is only when a judge or court has no jurisdiction of the subject-matter of the proceeding in which an order is made that the order is wholly void for want of jurisdiction. *Supreme Ct., 1862, Bingham a. Disbrow, Ante, 251.*
11. Jurisdiction of persons, how obtained, stated. *King a. Poole, 36 Barb., 242.*

CITY COURT OF BROOKLYN, 2; JUDGMENT, 3; MARINE COURT; PROHIBITION.

JURY.

QUESTIONS OF LAW AND FACT.

JUSTICES' COURTS.

1. Before a justice of the peace, or a district court of the city of New York, can acquire jurisdiction to proceed to trial in an action commenced by warrant of attachment, the return must show a strict com-

* This case was reversed on appeal, which will be reported in our next volume.

JUSTICES' COURTS.

- pliance with the statute; especially where the defendant has not appeared. *N. Y. Com. Pl.*, 1862, *Marshall a. Canty*, *Ante*, 237.
2. The plaintiff, in an action commenced by warrant, may have an adjournment, though he is a resident of the county, but the defendant must in such case be discharged from custody. [2 Rev. Stat., 239, § 72; 2 Cow. Tr., 2 ed., 840.] *Supreme Ct.*, 1862, *Pope a. Hart*, 35 *Barb.*, 630; *S. C.*, 23 *How. Pr.*, 215.
 3. An affidavit on an application to a justice for a warrant against a non-resident, for a tort, is sufficient in respect to the matter of residence, if it states that the plaintiff is a resident of the county, and that the defendant is not, but resides in another specified county. [Benedict Tr., 69, 70; 1 Cow. Tr., 463; 10 Wend., 360; 13 *Ib.*, 46; 14 *Ib.*, 237; 20 *Ib.*, 77; 1 Den., 592.] *Ib.*
 4. It is sufficient, in respect to other matters, for the plaintiff to state that he *believes* that he has a cause of action against the defendant, and then to set out such cause of action, showing it to be a tort. *Ib.*
 5. Where two joint-debtors have been sued in a justice's court, and only one served with process, and judgment is recovered by the plaintiff, he may proceed by a new summons and complaint against the debtor not served, stating, in the complaint, the former action, and the facts showing the liability of the present defendant; and may recover judgment against such defendant. This is, in effect, the procedure prescribed by the Code for courts of record, and its adoption in justices' courts preserves the uniform course of proceeding. *N. Y. Com. Pl.*, 1862, *Johnson a. Smith*, *Ante*, 421.
 6. An erroneous decision of a justice, concerning an adjournment, is waived by the subsequent consent of all parties to the adjournment. *Supreme Ct.*, 1861, *Nellis a. McCarn*, 35 *Barb.*, 115.
 7. An error in granting an adjournment, or holding a cause open, is cured by the appearance of both parties on the adjourned day, and their going to trial upon the merits. [7 Johns., 381; 9 *Ib.*, 136.] *Supreme Ct.*, 1860, *Seymour a. Bradfield*, 35 *Barb.*, 49.
 8. Of the power of a justice to grant an adjournment. *Nellis a. McCarn*, 35 *Barb.*, 115.
 9. Of the sufficiency of evidence concerning the absence of witnesses, to entitle a party to an adjournment. *Ib.*
 10. A trial being adjourned on motion of the defendant, one of the jurors, before whom it had been commenced, was unable to attend on the adjourned day. The defendant refused to proceed with the trial, or to consent to the issue of a new venire, returnable forthwith, or to have a talesman called. At his request, the justice dismissed the jurors present. He applied for an adjournment, on insufficient grounds, and

LIMITATIONS.

refused to comply with reasonable terms imposed by the justice as a condition thereof.

Held, that such conduct amounted to a waiver of a jury, and that the justice was right in proceeding, upon the plaintiff's application to try the cause himself, without a jury. *Supreme Ct.*, 1860, Babcock *a.* Hill, 35 *Barb.*, 52.

11. A justice has no power, upon the trial of an action for breach of warranty of a chattel, to compel a party or witness to produce it in court for inspection. *Supreme Ct.*, 1860, Hunter *a.* Allen, 35 *Barb.*, 42.
12. The judgment of a justice will not be reversed on account of his having allowed leading questions to be put to a witness, unless it is plain that he has abused his discretion. *Supreme Ct.*, 1860, Seymour *a.* Bradfield, 35 *Barb.*, 49.
13. Mode of proceeding on complaints for encroachments on highways, and appeals therein, regulated. *Laws of 1862*, 440, ch. 243.

APPEAL, 15, 16, 29; ATTACHMENT, 4.

LACHES.

Where the defendant moved for security for costs, on the third day after he first ascertained that the plaintiff was not a resident within the jurisdiction of the court,—*Held*, that laches could not be imputed to him, *N. Y. Superior Ct.*, 1861, Boucher *a.* Pia, *Ante*, 1.

LEASE.

An agreement to construct a wharf, to be occupied when finished by the grantee, at a stipulated rent, accompanied by words of present demise, operates as a lease. *Supreme Ct.*, 1862, People *a.* Kelsey, *Ante*, 372.

LIBEL.

Incorporated companies established for the purpose of transacting business,—*e. g.*, a bank,—may maintain actions of libel, the same as individuals, for words affecting their business or property; and without alleging special damage. There is no reason why any distinction should be made between corporations and individuals in respect to protection against defamation. *Supreme Ct., Sp. T.*, 1862, Shoe & Leather Bank *a.* Thompson, 23 *How. Pr.*, 253.

LIMITATIONS.

1. In respect to causes of action which accrued before the Code was enacted, the provisions of the Revised Statutes apply; and where a

LIMITATIONS.

- party had a concurrent remedy, at law and in equity, the Revised Statutes made the limitation six and not ten years. And the old common-law action of account cannot be considered a concurrent remedy with a bill in equity for an accounting between partners; especially where the firm consists of more than two persons. *Ct. of Appeals* (1862?), *Appleby v. Brown*, 23 *How. Pr.*, 207.
2. A promissory note, given in the form of a premium note, as and for a capital-stock note, in organizing a mutual insurance company, is payable on demand, and the Statute of Limitations begins to run against it from its date. It is otherwise of notes given for premium on insuring, which are payable according as the directors may assess them; for notes of this class are only engagements to pay a portion of losses, and an assessment is a condition precedent. But notes given as a part of the capital stock are payable absolutely; and the usual clause that they are payable in such times and portions as the directors may require is in legal import equivalent to "on demand." The provision of the charter that such notes are a part of the capital does not give them a permanency beyond the period fixed by the Statute of Limitations. *Ct. of Appeals*, 1862, *Howland v. Edmonds*, 23 *How. Pr.*, 152; reversing *S. C.*, 33 *Barb.*, 433. To the same effect, *Supreme Ct.*, 1862, *Sands v. St. John*, 23 *How. Pr.*, 140.
 3. As all capital-stock notes of mutual insurance companies must be made payable or be deemed payable "at the end or within twelve months from date" (*Laws of 1849*, 442, ch. 308, § 5), they become due absolutely at the expiration of twelve months from their dates; at which time an action may be commenced on them without any request or demand of payment, and the Statute of Limitations begins to run. [8 *Cow.*, 271; 3 *Wend.*, 13; 9 *Johns.*, 217; 16 *N. Y.*, 451.] *Supreme Ct.*, 1862, *Sands v. St. John*, 36 *Barb.*, 628.
 4. Under a *general* retainer to prosecute an action, the attorney may, upon perfecting judgment in favor of his client, bring an action immediately to recover his costs, and if he neglects to prosecute within six years after such judgment is perfected, the Statute of Limitations may be pleaded and will bar the action. On principle, there is no more reason why the statute should not apply to an attorney's bill than to any other contract, after the termination of the service upon which the demand arises; and the only question is, were the actions in which the costs are claimed brought to a determination six years before the commencement of the present action. *Supreme Ct.*, 1861, *Adams v. Fort Plain Bank*, 23 *How. Pr.*, 45.
 5. It might be otherwise where the retainer was *special*,—*e. g.*, to collect the debt—in which case the relation of attorney and client would not

LIMITATIONS.

be dissolved by judgment, but the performance of further duties should be shown in such case. *Ib.*

6. Where the note of a third person is taken in payment of a debt, the Statute of Limitations does not run on the debt until the note is due. [6 Barb., 252.] *Supreme Ct.*, 1861, *Fowler v. Clearwater*, 35 Barb., 143.
7. *It seems*, that the defence of the Statute of Limitations must in all cases, even where the cause of action accrued before the enactment of the Code of Procedure, be raised by answer. *Ct. of Appeals*, 1859, *Stewart v. Smith*, *Ante*, 75.
8. *It seems*, that a right of dower, accruing before the enactment of the Revised Statutes, is not affected by the limitation of the time for commencing the action prescribed by those statutes. *Ib.*
9. The *lex loci contractus* governs as to the nature, validity, construction, and effect of the contract, and the *lex fori* as to the remedy. The application of this rule disposes of any defence arising upon a Statute of Limitations of a foreign State, where such statute only prohibits the bringing of an action after the time limited in such State. The statute has no effect out of the State, and is not violated by bringing an action in another State. *Supreme Ct.*, 1862, *Gans v. Frank*, 36 Barb., 320.
10. Where the condition of a bond was "such, that the above sum of \$1,500 is to remain without interest in the hands of the above J., until such time as the said T. shall demand payment of the said J.; then, if paid, the obligations to be in full force and virtue."

Held, not a mere contract to pay on demand. It signified that the money was to remain in the hands of the obligor without interest until called for. A demand of payment was therefore necessary before the Statute of Limitations would begin to run. *Supreme Ct.*, 1862, *Sweet v. Irish*, 36 Barb., 467.
11. And where the obligee having died without making any demand, bequeathed to the obligor's wife the interest of the bond during her life,—*Held*, in effect, a bequest to the husband during their joint lives; and that so long as they lived, the principal sum was not due and payable, and the statute did not begin to run until the death of one of them, at which time the executors were directed to collect the money. *Ib.*
12. Where a judgment has been recovered against joint-debtors, and subsequently a summons to show cause why he should not be bound thereby, is served upon one of them, who was not served with the original summons, he cannot avail himself of the Statute of Limitations, though the process was not served upon him until after the lapse of

MANDAMUS.

the period prescribed by that statute. *Supreme Ct.*, 1862, *White's Bank v. Ward*, 35 *Barb.*, 637.

13. On a finding that the defendant passed through this State more than six years before commencement of the action, but was only here temporarily, and all the defendants had resided in Pennsylvania since the cause of action accrued,—*Held*, that the cause of action was not barred by our Statute of Limitations. *Supreme Ct.*, 1862, *Gans v. Frank*, 36 *Barb.*, 320.
14. Where a debtor comes into this State before process is served on him, and he leaves the State to reside elsewhere, the statute is not a bar until, after deducting all the time of residing abroad, the debtor has been in the State for six years. Whether the absence is repeated or is one continued absence is immaterial; six full years must be spent in the State. [26 *Barb.*, 208; 1 *E. D. Smith*, 1; 2 *Ib.*, 172.] *Ib.*
15. The Statute of Limitations does not operate as a bar to an action in the courts of this State, against a foreign corporation. [20 *N. Y.*, 210.] *Supreme Ct.*, 1861, *Thompson v. Tioga R. R. Co.*, 36 *Barb.*, 79.

ATTACHMENT, 3; COUNTIES; DIVORCE, 3.

LIS PENDENS.

1. That the commencement of an equitable action by the service of a summons and injunction creates a *lis pendens* and a lien in the nature of an attachment, or statute execution. But the plaintiff is bound to prosecute diligently to retain his lien. *Myrick v. Selden*, 36 *Barb.*, 15.
2. Notice of violation of fire laws in the city of New York may be filed as a *lis pendens*. *Laws of 1862*, 593, ch. 356, § 39.

MANDAMUS.

1. A mandamus is the proper remedy to compel the settlement of a case or bill of exceptions, and to settle it correctly. But before the writ will be issued to compel a settlement in a particular way, it must appear that the case will then be in accordance with the facts. *Supreme Ct.*, *Sp. T.*, 1861, *People v. Baker*, *Ante*, 19.
2. On the return to an alternative mandamus to a referee, requiring him to settle a case as therein prescribed, where the recitals did not set forth that the proposed settlement would be in accordance with the facts,—*Held*, that the writ was defective in not containing such an averment in a traversable form. *Ib.*

MARINE COURT.

3. On the return to an alternative mandamus, facts material to the issue occurring after the issuing of the writ may be pleaded. *Ib.*
4. A mandamus to restore a public officer should be granted, when the facts which justify his exclusion are not clearly made out. *Supreme Ct.*, 1861, *People on rel. Titus v. Board of Police, &c.*, 35 *Barb.*, 535.
5. The proprietors of a newspaper, which was not one of the two appointed by the supervisors to publish the laws, claimed that through an informality in the ballots for other papers, their paper was in fact appointed, and voluntarily published the laws.

Held, that a mandamus did not lie to compel the county to pay them for the publication. Labor and services voluntarily done for another, without his privity or consent, however meritorious or beneficial to him, afford no ground for an action. *Supreme Ct.*, 1862, *People v. Supervisors of Kings*, 23 *How. Pr.*, 89.

6. Where the court, on motion to quash the return to a writ of alternative mandamus, has sustained the return, it may issue a peremptory writ, although the issues raised by the return are found in favor of the defendant. *Supreme Ct.*, 1862, *People v. Board of Police*, *Ante*, 151.
7. On a trial of issues joined under an application for a mandamus, it is error to grant a nonsuit without preparing any findings of facts; and if such a course is taken, the general term will order a new trial. *Supreme Ct.*, 1861, *People on rel. Martin v. Board of Police, &c.*, 35 *Barb.*, 550.
8. It is competent for the jury, on the trial of issues in mandamus cases, to find a general verdict, and the court will give effect to it, if necessary, by applying it to the issues separately. *Supreme Ct.*, 1862, *People v. Board of Police*, *Ante*, 158.
9. Where several issues, arising on the return to a writ of alternative mandamus, are submitted to a jury, a general verdict may properly be directed. *Supreme Ct.*, 1862, *People v. Board of Police*, *Ante*, 151.

AMENDMENT, 7; CERTIORARI, 1; SUPERVISORS, 2; VERDICT, 3-5;
WITNESS, 1.

MARINE COURT.

1. The limitations of jurisdiction, as to matters of account, prescribed by the Code (§ 54, subd. 4), if it ever applied to the Marine Court of the city of New York, has been taken away by Laws of 1853, ch. 617, which extends the jurisdiction of that court, in certain cases, and regulates proceedings therein. *Supreme Ct.*, 1862, *People v. Marine Court of N. Y.*, *Ante*, 266.

MARRIED WOMEN.

2. A judgment of the Marine Court, dismissing the complaint, has the like effect with the same judgment in a court of record, and is, therefore, no bar to a new action for the same cause. [33 Barb., 357.] *Supreme Ct.*, 1861, *Dexter v. Clark*, 35 Barb., 271; S. C., 22 How. Pr., 289.
3. Sections 206–217 of the Code of Procedure,—which provide proceedings of claim and delivery,—made applicable to the Marine and District Courts in the city of New York; except that in actions commenced in the District Courts all papers or other processes in such actions shall be served by a marshal; and the Marine and District Courts shall have jurisdiction where the value of the property claimed does not exceed two hundred and fifty dollars. *Laws of 1862*, 974, ch. 484, § 17.
4. Present and future rules, &c., of Supreme Court applied to Marine and District Courts. *Laws of 1862*, 971, ch. 484, § 3.

APPEAL, 16, 20, 21; PROHIBITION, 1.

MARRIED WOMEN.

1. A married woman can make a valid agreement to compromise a disputed claim affecting her separate estate,—*e. g.*, to withdraw her opposition to the probate of a will,—where if the will was not admitted, her share of the estate would be increased. *Supreme Ct.*, 1861, *Palmer v. North*, 35 Barb., 282.
2. A married woman might be sued, concerning her separate property, and judgment rendered against her, under the statute of 1860, in precisely the same form as if she were unmarried. *Supreme Ct.*, 1861, *Barton v. Beer*, 35 Barb., 78; S. C., 21 How. Pr., 309.
3. An action sustained against a married woman, in a justice's court. *Id.*
4. A married woman, by accepting a deed of land subject to mortgage, and covenanting to pay the mortgage, does not bind herself or any of her separate property, other than the land so conveyed; unless such deed and covenant are made in the course of a trade or business carried on by her. *Supreme Ct.*, *Sp. T.*, 1862, *Brown v. Hermann*, *Ante*, 394.
5. Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were sole; and any married woman may bring and maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property. In case it shall be necessary, in the prosecution or defence of any action brought by or against a married woman, to enter into any bond or undertaking, such bond or undertaking may be executed by such married woman with the same effect in all respects as if

MISNOMER.

she were sole, and in case the said bond or undertaking shall become broken or forfeited, the same may be enforced against her separate estate. *Laws of 1860, 157, ch. 90, § 7; as amended by Laws of 1862, ch. 172, § 8.*

6. In an action brought or defended by any married woman in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character, or property, if judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of such judgment out of her separate estate, though the sum recovered be less than one hundred dollars. *Laws of 1862, 345, ch. 172, § 5.*

ARREST, 2.

MARSHALS.

CONSTABLES.

MECHANICS' LIEN.

The Mechanics' Lien Laws of 1853 and 1854 relating to the counties of Kings and Queens, repealed, and a new statute substituted. *Laws of 1862, 947, ch. 478.*

MILITARY.

ARREST, 9.

MISNOMER.

A motion to set aside the process on proceedings in a cause, on the ground of misnomer of the defendant, will not be entertained, but the court will leave the defendant to his plea in abatement. Although the order of February, 1825 [4 Cow., 184], forbidding a motion to set aside the process on the ground of misnomer of the defendant, does not appear to have been incorporated in the body of the written rules afterwards from time to time promulgated, yet the practice conformed thereto; and the Rules of 1829, No. 72, provide that in cases not provided for by statute on these rules, the proceeding shall be according to the customary practice as it has heretofore existed.

The revision of the rules made in 1845, do not contain any saving, in terms, of pre-existing practice, but they cannot be deemed to abrogate a practice then long established, which was not dependent upon any court rule, which was the subject of revision, any more than they should be regarded as abrogating the entire system of practice, a small portion of which was then to be found prescribed in the written body

MOTIONS AND ORDERS.

of rules in use. But in the revision of July, 1847, under the new Constitution and the Judiciary Act, and also by the Code, it is expressly declared that in cases not provided for by statute, the proceedings shall be according to the existing practice.

In the Code there is nothing inconsistent with the practice heretofore existing on this subject. Section 175 provides that when the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly; and an amendment is the remedy where the true name is discovered. *N. Y. Superior Ct., Sp. T.*, 1861, *Miller a. Steltiner*, 22 *How. Pr.*, 518.

MISTAKE.

CAUSE OF ACTION, 12.

MORTGAGE.

1. An assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the debtor or his assignees, is in effect a mortgage, and where the debt which it is designed to secure is paid, the property reverts to the original owner. *Supreme Ct.*, 1862, *McClelland a. Remsen*, *Ante*, 331.
2. Proceedings given by petition to the Supreme Court or to the Superior Courts of New York or Buffalo, to discharge of record any mortgage of real estate in this State, recorded in this State, and which from the lapse of time, is presumed to be paid. *Laws of 1862*, 610, ch. 365.

CHATTEL MORTGAGE; RECORDING DEEDS.

MOTIONS AND ORDERS.

1. In proceedings upon a motion,—*e. g.*, an application for a provisional remedy,—the burden of proof lies upon the party holding the affirmative of each particular issue. If the party opposing the motion admits the principal allegations upon which it is founded, but sets up new matter in avoidance, the burden of proof devolves upon him. *N. Y. Com. Pl., Sp. T.*, 1862, *Shearman a. Hart*, *Ante*, 358.
2. That when the favor of the court is appealed to, the court will not incline to grant what is not shown to be for the advantage of the party asking it, and when it is to be inferred that the motion is made for some concealed purpose. *Supreme Ct., Sp. T.*, 1862, *Ball a. Sprague*, 23 *How. Pr.*, 241.

MOTIONS AND ORDERS.

3. A motion to set aside any proceeding on the ground of irregularity must be made promptly, and before the moving party takes any other step in the cause. *N. Y. Superior Ct., Sp. T., 1862, Persse & Brooks' Paper Works v. Willet, Ante, 119.*
4. No application to set aside proceedings for irregularity merely will be allowed, unless made within a reasonable time; nor where the party applying has taken a fresh step, after knowledge of the irregularity. *Supreme Ct., Chambers, 1862, Low v. Graydon, Ante, 443.*
5. But the right to put in an answer to an amended complaint, is substantial, and a waiver of it should not be implied. *Ib.*
6. Where the party opposing a motion, introduces affidavits setting up new matter, in avoidance of the allegation contained in the affidavits of the moving party, the latter has a right to introduce new affidavits for the purpose of contradicting such averments of new matter. *N. Y. Com. Pl., Sp. T., 1862, Shearman v. Hart, Ante, 358.*
7. But the moving party will not be allowed to set up new matter in such affidavits in avoidance of the allegations of his opponent. *Ib.*
8. The court will not, on motion, allow parol evidence, to enlarge the operation of a written agreement between the parties to an action, so as to discharge the lien of a judgment upon real estate belonging to the person against whom the judgment was recovered. *Supreme Ct., Chambers, 1861, Peet v. Cowenhoven, Ante, 56.*
9. The court will not try the validity of an insolvent's discharge on affidavits. *N. Y. Com. Pl., 1862, Stuart v. Salhinger, Ante, 291.*
10. The decision of a judge before whom a motion is made, upon conflicting evidence, is conclusive, so far as questions of fact are concerned. *Supreme Ct., 1861, Skinner v. Oettinger, Ante, 109.*
11. A motion to correct a verdict, on the ground of a misdirection of the judge, must be founded on a case made. *N. Y. Superior Ct., Chambers, 1862, Brush v. Kohn, Ante, 51.*
12. On motion to vacate an attachment issued as a provisional remedy under the Code, founded on defendant's affidavit, the plaintiff will be allowed to make out his right to the attachment by supplementary affidavits. *N. Y. Superior Ct., Chambers, 1861, Gasherie v. Apple, Ante, 64.*
13. On a motion to set aside a complaint for departing from the summons in respect to the demand, the court should allow the plaintiff to amend the summons on terms, and to retain the complaint. *Supreme Ct., Sp. T., 1862, Norton v. Cary, Ante, 364.*
14. Where, on appeal from taxation of costs, a trifling sum had been stricken out for the insufficiency of the affidavit as to the items of it;—*Held*, that leave to supply the defects in the affidavits should not be

NEW TRIAL.

granted, without excuse shown for the omission. [1 Johns., 555.] *Supreme Ct., Sp. T.*, 1862, Ball *a.* Sprague, 23 *How. Pr.*, 241.

15. An omission to enter an order does not give the right to agitate the same question by a fresh motion. The unsuccessful party can enter the order when he desires to appeal, if the prevailing party omits to do so. *Supreme Ct., Chambers*, 1861, Peet *a.* Cowenhoven, *Ante*, 56.
16. An order directing the continuance of a receivership during the pendency of any appeal which should be taken from the final decree,—*Held*, to continue the receiver's authority not only during appeal to the general term, but also during an appeal to the Court of Appeals from an order of the general term granting a new trial. *Supreme Ct.*, 1862, McMahon *a.* Allen, *Ante*, 220.
17. An order requiring payment of the costs accruing after notice of the trial, had as a condition of granting a new trial, construed to mean costs of the trial and all subsequent proceedings. North *a.* Sargeant, *Ante*, 224.
18. After such an order is made, the costs must be regularly adjusted before the time allowed for their payment, under Rule 57, begins to run; and this notwithstanding the costs are fully stated on the judgment-roll, and require nothing more than to be separated from the other and earlier costs of the action. *Ib.*

APPEAL, 1, 2, 7, 8; ARREST, 10-13; ATTACHMENT, 8; COURTS, 1; DEFAULT; DISCOVERY; INJUNCTION, 5-7; JURISDICTION, 6, 10; MISNOMER; PLEADING, 16, 17; RECOGNIZANCE, 2; SUPPLEMENTARY PROCEEDINGS.

MUNICIPAL CORPORATION.

COSTS, 11.

NE EXEAT.

ARREST, 2.

NEW TRIAL.

1. The mere fact that a juror attempts to communicate the verdict to the party in whose favor it is rendered, before it is announced in court, is not sufficient ground for setting the verdict aside. *N. Y. Superior Ct., Sp. T.*, 1862, Fash *a.* Byrnes, *Ante*, 12.
2. Upon an exception to a refusal to dismiss the complaint, if the evidence was insufficient to be submitted to a jury, a new trial should be granted. *N. Y. Superior Ct.*, 1862, Howard *a.* Holbrook, 23 *How. Pr.*, 64.

NEW YORK (CITY OF).

3. In an action to recover for services, defendant gave testimony of an agreement that certain of the services should not be paid for unless successful; and plaintiff gave testimony denying such an agreement, and tending to show that there was an agreement relating to subsequent services; and the referee found in accordance with the latter testimony.

Held, at newly discovered evidence, that plaintiff was not present at the time when and place where the defendants testified the agreement they set up was made; and, also, evidence that at the time the agreement which plaintiff testified was made, there was an agreement made in substance like that proved by the plaintiff, must be regarded as cumulative. [10 Wend., 285, 293.] *Supreme Ct.*, 1862, *Adams v. Bush*, 23 *How. Pr.*, 262.

4. The Court of General Sessions of the city and county of New York, have power to grant new trials upon the merits, and on the ground of newly discovered evidence. The act of 1859 (*Laws of 1859*, ch. 339, § 4),—which grants to the Courts of Sessions of the several counties of the State the power to grant new trials,—extends to the Court of General Sessions in the city and county of New York. *Gen. Sess.*, 1862, *People v. Powell*,* *Ante*, 91.

COSTS, 12; VERDICT.

NEW YORK (CITY OF).

1. On application to vacate an assessment for a local improvement in the city of New York, on the ground of fraudulent collusion between the street-commissioner and the contractor, in not awarding the contract to the lowest bidder, and in ascertaining and allowing the amount paid for work under the contract as made;—*Held*, that the fraud and irregularities complained of were not, “in the proceedings relative to the assessment,” within the meaning of *Laws of 1858*, ch. 338,—which authorizes a party aggrieved by any fraud or irregularity in such proceeding, to apply to a justice of the Supreme Court to vacate the assessment. *Supreme Ct., Chambers*, 1862, *Hay’s Case*, *Ante*, 53.
2. “Legal irregularity” in an assessment for a local improvement, in the city of New York, within the meaning of *Laws of 1858*, ch. 338, is an omission of, or irregularity in, one or more of the statutory steps required in laying the assessment. *Id.*

* This case was overruled in that of *People v. N. Y. General Sessions*, which will appear in our next volume.

PARTIES.

3. Under the act authorizing assessments, in the city of New York, to be set aside for fraud or legal irregularity in the proceedings relative thereto, or in the proceedings to collect the same—the expression “proceedings relative to an assessment,” means the proceedings taken previous to the laying of the assessment. The proceedings to collect the same, mean the distribution of the amount upon the various parties assessed, for the purpose of collection, and the collection thereof. The former would extend to any legal irregularity in regard to the indebtedness for which the assessment was laid; the latter, to any irregularity in the proceedings for its collection. *Supreme Ct., Sp. T., 1862, Matter of Babcock, 23 How. Pr., 118*; dissenting from *Matter of Keyser, 10 Abbotts' Pr., 481*.
4. That the court will not, under the statute, set aside an assessment, on the ground of fraud, upon purely documentary evidence; for errors therein may as well be supposed to be mistakes honestly made, as the result of intentional fraud. Public officers are presumed to have honestly discharged their duties. *Supreme Ct., Sp. T., 1862, Matter of Babcock, 23 How. Pr., 118*.
5. That a mistake, which if brought before the proper officers before confirmation, might have been corrected or explained, is not an error sufficient to vacate the assessment without proof of fraudulent intent. *Ib.*
6. Sections 18–21 of Laws of 1843, 321, ch. 230, relating to proceedings of sequestration, and by action, against corporation in default as to taxes repealed. *Laws of 1862, 319, ch. 152*.

APPEAL, 28; COURTS, 3; COURTS OF SESSIONS; INJUNCTION, 8; JUDGMENT, 11.

OFFICE.

CAUSE OF ACTION, 5.

OFFICER.

ASSIGNABILITY OF CAUSE OF ACTION, 1; MANDAMUS, 4; PROCESS.

PARTIES.

1. Where the evidence or testimony of one party to the action is explicitly contradicted by the evidence or testimony of another, the party holding the affirmative of the issue must be corroborated in some manner, or fail. *N. Y. Com. Pl., Sp. T., 1862, Shearman a. Hart, Ante, 358*.
2. No one has the right to make another a party to an action, when the

PARTIES.

- same controversy is in course of settlement in another court. *Supreme Ct., Sp. T.*, 1862, *Danvers a. Dorrity, Ante*, 206.
3. An action by a public officer, as such, should be brought in his individual name with the title of his office annexed. [4 Hill, 136; 5 Ib., 215; 1 Den., 229; 27 Barb., 97.] *Supreme Ct.*, 1862, *Paige a. Fazzackerly*, 36 *Barb.*, 392.
 4. A married woman may be sued in any of the courts of this State, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate, in the same manner as if she was sole. *Laws of 1862*, 345, ch. 172, § 7.
 5. An imprisoned debtor is equally subject to be sued and prosecuted to judgment, and to be proceeded against in all the modes prescribed by law to enforce civil remedies, as if he were at large. *N. Y. Superior Ct.*, 1862, *Morris a. Walsh, Ante*, 387.
 6. The rule excluding a public enemy from our courts is one exclusively of public policy, and applies in full force to the case of citizens of the seceded States; especially since the President by proclamation has declared commercial intercourse with such States unlawful. *Supreme Ct., Sp. T.*, 1862, *Bonneau a. Dinsmore*, 23 *How. Pr.*, 397.
 7. The trustees of a religious corporation are its managing agents, and may act for it as fully as the directors or agents of other corporate bodies. *Supreme Ct., Sp. T.*, 1862, *Matter of St. Ann's Church, Ante*, 424.
 8. Persons claiming to be trustees of a religious corporation, who have not been in possession of the church edifice nor of any of the temporalities of the church, nor have exercised any of the duties of the office, cannot maintain an action in the corporate name to restrain individuals in possession from closing the church edifice, preventing meetings, &c. *Supreme Ct.*, 1862, *North Baptist Church a. Parker*, 36 *Barb.*, 171.
 9. Before plaintiffs can maintain such an action, they must have been peaceably admitted to the office of trustees of the society, or have established their title thereto by a direct proceeding or action brought for that purpose. *Ib.*
 10. A member of a firm, who has made a promissory note in the name of the firm, in which the promise is joint and several, may be sued alone thereon. He is estopped from alleging want of authority to make such a note. [18 Johns., 459; distinguishing 1 Wend., 524.] *Supreme Ct.*, 1860, *Snow a. Howard*, 35 *Barb.*, 55.
 11. The owner of land, including a mortgagee in possession, may maintain an action for the possession of specific articles which were, before their wrongful removal, fixtures on the land. *Supreme Ct.*, 1860, *Lafin a. Griffiths*, 35 *Barb.*, 58.

PARTIES.

12. Where such an action is brought by one who, at the time of the wrongful taking, was a mortgagee in possession, the fact that his mortgage has been since satisfied by his purchase of the premises on foreclosure, is no bar to the action. *Ib.*
13. A husband and wife cannot bring a joint action for an assault upon the wife. The right of action is in the wife alone. [Laws of 1860, 158, ch. 90.] *Supreme Ct.*, 1860, Mann *a.* Marsh, 35 *Barb.*, 68; S. C., less fully, 21 *How. Pr.*, 372.
14. It is settled that when a debtor fraudulently disposes of his property to several persons, his judgment-creditors may sue all such persons in one action, for the purpose of having such property applied to the satisfaction of their claims. *Supreme Ct.*, *Sp. T.*, 1862, Newbould *a.* Warrin, *Ante*, 80.
15. In an action by a creditor to avoid a conveyance, one who innocently accepted a deed of the property for the benefit of the alleged fraudulent grantee, and who has conveyed in accordance with the trust, is not a proper party. *Supreme Ct.*, *Sp. T.*, 1861, Spicer *a.* Hunter, *Ante*, 4.
16. Where a widow sues the heirs to recover her dower, and claims also an account and payment of rents and profits, all the heirs are proper, and, *it seems*, necessary parties; although her complaint charges only a part of their number with having received the rents and profits. Those of the heirs-at-law who have received no part of the rents and profits of the intestate since his death, are entitled to receive their due proportion or share from those heirs who have collected and received them; and therefore they are necessary parties to an action brought by the widow of their ancestor to recover her dower and have it assigned to her, and also to ascertain the value of the rents and profits, which of the defendants have collected and received them, and to have her share thereof paid over to her. *Supreme Ct.*, 1861, Van Name *a.* Van Name, 23 *How. Pr.*, 247.
17. In an action to recover the plaintiff's one-half share of the sum received in the year 1856, by the defendant, from the city of New York, as an award to "unknown owners" for land taken for public purposes, the complaint contained the averment that one A. died, seized of the land, in 1835, leaving as sole heirs-at-law two sons, C. and the plaintiff.
Held, on demurrer, that there was no defect of parties plaintiff in not joining C., or the persons seized, at the time of the award, of the undivided half which plaintiff did not claim. *Supreme Ct.*, *Sp. T.*, 1861, Van Wart *a.* Price, *Ante*, 4, *note*.

PLACE OF TRIAL.

ABATEMENT; DEMURRER, 1-5; MARRIED WOMEN; REMOVAL OF CAUSES, 3; SHERIFF, 2; WITNESS, 13.

PARTITION.

1. The right of one of several joint-owners to a partition of undivided real property is not absolute. *Supreme Ct., Sp. T.*, 1862, *Danvers a. Dorrity, Ante*, 206.
2. It is irregular to institute proceedings in partition on behalf of an infant, without first obtaining the authority of the court. *Supreme Ct., Chambers*, 1861, *Clark a. Clark, Ante*, 299.
3. Where, in an action for the partition of real property owned by partners in joint tenancy, it appeared on the trial that the action had been commenced during the pendency of an action brought by the defendant in another court for a dissolution of partnership and an accounting, which involved the real property in question;—*Held*, that the complaint must be dismissed. *Supreme Ct., Sp. T.*, 1862, *Danvers a. Dorrity, Ante*, 206.
4. After a sale of land under proceedings in partition, instituted by petition pursuant to 2 Rev. Stat., 317, § 1, the purchaser objected to the title, on the ground that such proceedings were abolished by the Code.

Held, that he should not be compelled to complete his purchase. *Supreme Ct.*, 1862, *Matter of Cavanagh, Ante*, 258.

GUARDIAN.

PARTNERSHIP.

ASSIGNMENT; CAUSE OF ACTION, 7.

PATENT FOR LANDS.

CAUSE OF ACTION, 11.

PAYMENT.

DEFENCES, 5.

PLACE OF TRIAL.

1. In the actions referred to in section 125 of the Code, the place of trial must be laid in a county in which some one of the parties to the ac-

PLEADING.

tion resides, without regard to the convenience of witnesses. *Supreme Ct., Chambers, 1862, International Life Assurance Co. a. Sweetland, Ante, 240.*

2. A foreign corporation having an agency and business office in one of the counties of this State, is not a resident of such county within the meaning of section 125 of the Code. *Ib.*

PLEADING.

1. Where, in an instrument for the payment of money, the name of the payee is left blank, with the intention that such instrument may be transferred by delivery, since any lawful holder may fill the blank with his own name as payee, he may plead it in an action thereon as having been delivered to some persons unknown, for a consideration from them received, and as having thereafter come lawfully into plaintiff's possession, and that he is owner thereof. *Supreme Ct., 1862, Hubbard a. N. Y. & Harlem R. R. Co., Ante, 275.*
2. Form of a complaint, in such case, held sufficient on demurrer. *Ib.*
3. The conditions of liability upon negotiable paper are within the cases provided for in section 162 of the Code. *Supreme Ct., 1862, Ferner a. Williams, Ante, 215.*
4. It must be deemed settled by authority, that where there is a new promise to pay a debt barred by the Statute of Limitations, it is not necessary to count upon this as a new contract; but the action may be brought upon the original obligation. *Supreme Ct., 1862, Sands a. St. John, 23 How. Pr., 140.*
5. An allegation that a note was given to provide for payment,—*Held*, not to mean a present payment, but a provision for a future payment. *Supreme Ct., 1861, Bates a. Rosekrans, 23 How. Pr., 98.*
6. In pleading a party's title to public office, an averment that under and in pursuance of the laws of this State, on a specified day he was duly appointed to fill such office, and duly made and executed his official bond with sureties, and took the oath of office required by law, and was thereby constituted such officer, and was thenceforth entitled to hold and administer such office, is sufficient on demurrer. *Supreme Ct., 1862, Platt a. Stout, Ante, 178.*
7. A defence of the Statute of Limitations can only be taken by answer. [Cade § 74; 10 How. Pr., 383; 16 *Ib.*, 546.] *Supreme Ct., 1862, Sands a. St. John, 36 Barb., 628.*
8. Hence it is unnecessary for plaintiff to allege in his complaint any facts or circumstances to avoid or anticipate the defence of the Statute of Limitations. *Ib.*

PLEADING.

9. Under section 161 of the Code, it is necessary in pleading the determination of an officer of special jurisdiction, to designate the officer; an averment that such determination was duly made is insufficient. *N. Y. Superior Ct.*, 1861, *Carter v. Koezley*, *Ante*, 147.
10. The objection that the facts stated in the complaint do not present a proper case for the exercise of the equitable power of the court to remove a cloud from plaintiff's title, is not an objection to the jurisdiction of the court which must be taken specifically under section 144, subd. 1, of the Code; but it may be taken by demurrer under subd. 6 of that section, on the ground that the complaint does not state facts sufficient to constitute a cause of action. [14 How. Pr., 456; 17 Barb., 260.] *Supreme Ct.*, 1861, *Hotchkiss v. Elting*, 36 Barb., 38.
11. It is only every material allegation of the complaint, not controverted by the answer, that is taken to be true. It is therefore not necessary that the defence of the Statute of Limitations should be accompanied by a denial of the allegations of the complaint intended to avoid or head off that defence, to prevent the court taking them as true. *Supreme Ct.*, 1862, *Sands v. St. Johns*, 36 Barb., 628.
12. Evidence of a former recovery for the same cause of action cannot be given in any action whatever, under an answer containing only denials of the complaint, or an allegation of the pendency of another action. [Code, § 149.] *Supreme Ct.*, 1861, *Hendricks v. Decker*, 35 Barb., 298.
13. The rule of the old practice, permitting such evidence to be given under the general issue in actions of ejectment and trover [2 Hill, 478; 5 Ib., 61; 6 Ib., 125; 6 Wend., 284; 9 Ib., 9], is abrogated by the Code. *Ib.*
14. Where, after an answer has been served, setting up the pendency of another action, judgment has been rendered therein, the proper course to make evidence of such judgment admissible, is to obtain leave to serve a supplemental answer, alleging the fact. [Code, § 177; 8 How. Pr., 56.] *Ib.*
15. Under a complaint alleging negligence generally, and also specifying particular acts of negligence, evidence of any other kind of negligence is admissible. The general allegation being sufficient, the particular charges, being surplusage, should not affect the reception of evidence. *Supreme Ct.*, 1861, *Edgerton v. N. Y. & Harlem R. R. Co.*, 35 Barb., 389.
16. To warrant striking out a pleading as frivolous, it must be clearly bad on inspection merely. *Supreme Ct.*, 1862, *Smith v. Mead*, *Ante*, 262.
17. *It seems*, that a charge of receiving the plaintiff's money contrary to the statute of betting and gaming, with the statement of other circumstances necessary to make it definite and certain, is a sufficient state-

PROHIBITION.

ment of facts constituting a cause of action. *Betts v. Bache, Ante*, 279.

AMENDMENT, 1, 4, 6, 8; ANSWER; COMPLAINT; COUNTER-CLAIM; LIMITATIONS, 7; VARIANCE; VERIFICATION.

POLICE.

The power given to commissioners of police by section 27 of the act, to make general rules, does not authorize a rule declaring that officers shall be deemed always on duty, which can conclude the courts in determining a question of exemption. *Supreme Ct., Sp. T.*, 1862, *Hart v. Kennedy, Ante*, 432.

ARREST, 6-8.

POOR.

County superintendents and overseers of the poor, except in the county of New York, to have same power to redeem the real estate which may have been seized by them, pursuant to 1 Rev. Stat., 614. &c., as is now possessed by judgment-creditors, under 2 Rev. Stat., 365,—subject to certain regulations. *Laws of 1862*, 872, ch. 473, § 1.

PRECEDENT.

Decisions of N. Y. Common Pleas and Superior Court declared not conclusive authority in Supreme Court. *Hotchkiss v. Elting*, 36 *Barb.*, 38.

PRESUMPTIONS.

EVIDENCE.

PROCESS.

That process, regular on its face, emanating from a court, or magistrate, or body of men having authority to issue it, and possessing jurisdiction of the subject-matter to which the process relates, protects the ministerial officer executing it. [6 *Wend.*, 367; 5 *Ib.*, 170; 12 *Ib.*, 496; 24 *Ib.*, 485; 5 *Hill*, 440; 2 *N. Y.*, 473.] *N. Y. Com. Pl.*, 1862, *Imbert v. Hallock*, 23 *How. Pr.*, 456.

WITNESS, 13.

PROHIBITION.

1. Where three actions were commenced in the Marine Court of the city and county of New York, upon three promissory notes for \$600, \$650,

QUESTIONS OF LAW AND FACT.

and \$600 respectively, the plaintiff claiming to recover only the amount of \$500 in each suit; in which actions the defendant, after objecting to the jurisdiction of the court on several grounds, set up in his answers three several counter-claims arising on contract, one for \$80, one for \$1,200, and the other for \$1,000, which answers were severally verified;—*Held*, that a writ of prohibition could not issue, as the Marine Court had jurisdiction of the subject-matter of the actions. *Supreme Ct.*, 1862, *People v. Marine Court of N. Y.*, *Ante*, 266.

2. A writ of prohibition issues only to restrain an excess of jurisdiction over subject-matter. *Ib.*
3. A writ of prohibition should not be issued to restrain an inferior court from proceeding in an action commenced by attachment, where the objection is that the attachment was irregularly issued, and upon insufficient affidavits. *Ib.*
4. Where no facts are set forth in the return to an alternative writ of prohibition, an absolute prohibition does not issue of course. *Ib.*
5. An injunction ought not to issue for the purpose of restraining a judicial officer from transcending his jurisdiction; a writ of prohibition being the proper remedy in such a case. *Supreme Ct.*, *Sp. T.*, 1861, *Ward v. Kelsey*, *Ante*, 106.

QUESTIONS OF LAW AND FACT.

1. A sale of chattels is not absolutely void as against creditors when unaccompanied by a change of possession. When any proof bearing upon the question of intent or good faith is given, it must be submitted to the jury to be determined by them like any other question of fact. The court cannot withhold it from them, and determine the question as one of law. [23 Wend., 653; 26 Ib., 511; 4 Hill, 271; 6 Ib., 433; 4 N. Y., 307.] *N. Y. Com. Pl.*, 1862, *Kellogg v. Wilkie*, 23 *How. Pr.*, 233.
2. In actions for injuries resulting from negligence, if it appears from the evidence that the injured person was guilty of any negligence which contributed to the injury, there can be no recovery; and although, as a general rule, questions of negligence belong exclusively to the jury, cases may no doubt arise in which the proof of negligence would be so clear and irresistible, that the court would be justified in assuming, without submitting the question to the jury, that negligence was established. At the same time it is obvious, considering the nature of the question, that such instances must be rare. If there is any conflict in the evidence going to establish any of the circumstances upon which the question depends, it must be left to the jury. If there are

REAL PROPERTY.

inferences to be drawn from the proof, which are not certain and incontrovertible, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved—this involving, as it generally must, more or less of conjecture—can only be settled by a jury. *Ct. of Appeals*, 1861, *Bernhardt v. Saratoga R. R. Co.*, 23 *How. Pr.*, 166.

3. Though negligence is a question of fact, yet where the proof of negligence is clear and irresistible, the court may be justified in assuming, without submitting the question to the jury, that negligence was established. In every case where a verdict would be set aside as against the clear weight of evidence, the court should take the decision of the case from the jury. The applicability of the rule is not varied by saying that the evidence may consist of circumstances, from which inferences are to be drawn as to negligence; and that as different minds may draw different inferences from the same circumstances, the jury must always be the judges of negligence where the evidence is circumstantial. No one ever supposed that the right of a tribunal of review, to reverse a verdict as against the weight of evidence, was confined to the cases of direct, positive testimony. The right covers all cases, by whatever kind of legal evidence any of them are sought to be proved, and it proceeds according to the weight of the evidence, whether circumstantial or not. *Ct. of Appeals*, 1862, *Wilds v. Hudson River R. R. Co.*, 23 *How. Pr.*, 492; reversing *S. C.*, 33 *Barb.*, 503.
4. If there is some evidence that a draft was taken as collateral security, for a note over due, the question should be submitted to the jury whether there was an agreement to extend the time of payment on the former note, or whether the new security was given as collateral to the old. *Supreme Ct.*, 1862, *Taylor v. Allen*, 36 *Barb.*, 294.

RAILROAD COMPANIES.

Regularity of proceedings before a county judge under the acts of 1836 and 1838, incorporating the defendants as a railroad company, for the appointment of a jury of appraisers to assess the value of the land required for the road. *Hotchkiss v. Auburn & Rochester R. R. Co.*, 36 *Barb.*, 600.

REAL PROPERTY.

When the State makes a grant of land, covered with the waters of a bay or navigable river, and the grantee reclaims and raises it above the

RECOGNIZANCE.

surface of the water, he is invested with all the rights that pertain to the ownership of land. *Supreme Ct.*, 1862, *People v. Kelsey*, *Ante*, 373.

RECEIVER.

1. The statutes provide but for three cases in which a receiver of the property of corporations (other than moneyed corporations) can be appointed: 1. Upon the application of a creditor, by judgment or decree, on the return of an execution unsatisfied. 2. When a corporation has been insolvent for a year, or has neglected or refused for a year the payment of its debts, or has suspended business for a year. 3. Upon the application of the directors or trustees. [2 Rev. Stat., 463, §§ 36, 38, 58.] *Supreme Ct.*, 1862, *Galway v. U. S. Steam Sugar Refining Co.*, 36 *Barb.*, 256; affirming S. C., 13 *Abbotts' Pr.*, 211; 21 *How. Pr.*, 313.
2. A receiver of a manufacturing corporation will not be appointed in an action brought against it by a creditor at large, on the grounds that the company is insolvent, and that its trustees, instead of applying to the court for a dissolution, are intending to suffer judgments to be recovered against the company, and thus by priority of lien to give preferences to creditors. *Ib.*
3. An order for the appointment of a receiver, under section 298 of the Code, founded on the voluntary appearance and examination of a judgment-debtor, is valid. *Supreme Ct.*, 1862, *Bingham v. Disbrow*, *Ante*, 251.
4. The court will not appoint more than one person receiver of a judgment-debtor's property, in supplementary proceedings, however many creditors' bills or supplementary proceedings are instituted against him. Such appointment in one proceeding completely divests the judgment-debtor of his title to all his property. *Supreme Ct.*, 1861, *Myrick v. Selden*, 36 *Barb.*, 15.
5. It is a contempt to bring an action against a receiver, without leave of the court which appointed him; and the proceedings in such an action will be stayed. *Supreme Ct.*, *Chambers*, 1862, *Taylor v. Baldwin*, *Ante*, 166.

REFERENCE, 1.

RECOGNIZANCE.

1. Recognizance defined as an obligation of record, entered into before a court or officer, duly authorized for that purpose, with a condition to

REFERENCE.

- do some act required by law, which is therein specified. [Bouv. L. Dict.] *Supreme Ct.*, 1860, *People v. Felton*, 36 *Barb.*, 433.
2. A recognizance, though taken in open court, and the entry in the minutes from which it was drawn up, properly entitled the cause, stated the penalty, the court before which the accused was to appear, together with the time and place, the indictment and the offence, but did not contain any acknowledgment of indebtedness to the People of the State.

Held, 1. That this was not in compliance with the statute, and that the entry in the minutes did not amount to a recognizance. [6 *Hill*, 506; 1 *Park. Cr.*, 141.]

2. That the court had no authority to allow an order, *ex parte*, to correct the entry so as to declare that the sureties acknowledged themselves indebted to the People of the State; even though it were the intention of the recognitors to have assumed such obligation and they supposed they had. *Ib.*

RECORDING DEEDS.

In cases where a mortgage is made to executors, as such, and the money is payable to them and their survivors or successors, and not to their personal representatives, one of such executors may receive payment and satisfy the mortgage on the record, as well as all, and the register should, in such a case, file and enter the satisfaction; and if he refuses he may be compelled by mandamus. *Supreme Ct.*, 1862, *People v. Miner*, 23 *How. Pr.*, 223; reversing *S. C.*, 32 *Barb.*, 612.

MORTGAGE, 2.

REFEREES.

DEPOSITION, 1, 2.

REFERENCE.

- References authorized, of controversy between receivers of mutual insurance companies and any person against whom he holds a claim, to be ordered either before or after suit brought, or to be made by agreement in writing without suit. *Laws of 1862*, 743, ch. 412.
- On application to the court to protect the lien of the attorney, the existence and extent of such lien may be determined in a summary way—as by a reference. The client cannot claim a right to trial by jury. *Supreme Ct.*, 1862, *Ackerman v. Ackerman*, *Ante*, 229.
- Where an action has been tried before the court without a jury, the

REFERENCE.

only authority for entering judgment is the decision of the judge who tried the cause. A reference to compute the amount of the recovery, if not authorized by the decision, is irregular. *N. Y. Superior Ct.*, 1862, *Chamberlain a. Dempsey*, *Ante*, 241.

4. Provisions of 2 Rev. Stat., 45, §§ 19-22, relating to references in controversies between trustees and debtors—amended. *Laws of 1862*, 625, ch. 373.
5. A fact which is necessary to sustain the legal conclusion arrived at by the referees, and the judgment predicated upon it, must be expressly found. Every thing asserted to support the judgment must appear in the statement of facts. No fact is or can be implied from the conclusions of law; they follow as the result of facts separately stated. *N. Y. Com. Pl.*, 1862, *Tomlinson a. Mayor, &c.*, of N. Y., 23 *How. Pr.*, 452.
6. A referee exercises the functions both of a court and of a jury; and in reviewing a judgment rendered by a referee, the court acts simply as an appellate court, and must reverse a judgment not warranted by appropriate findings on the questions of fact, if the proper exceptions are taken. *Supreme Ct.*, 1861, *Buckingham a. Payne*, 36 *Barb.*, 81.
7. In an action for divorce by the wife on the ground of cruelty, the defendant, after a general denial, set up as separate defence, that plaintiff had already a husband living at the time of the marriage of the parties, and on this ground claimed a divorce in his favor. The referee reported that plaintiff's former husband was living at the time of the marriage of the parties, and refused to grant a divorce to either party, directing judgment against the plaintiff.
Held, that the report was insufficient as the foundation of a judgment in defendant's favor, annulling the marriage. *Supreme Ct.*, 1861, *Linden a. Linden*, 36 *Barb.*, 61.
8. The report of a referee will not be set aside unless unsupported by, or clearly against, evidence. [16 *Barb.*, 146; 15 *Ib.*, 28.] *Supreme Ct.*, 1862, *Dunning a. Roberts*, 35 *Barb.*, 463.
9. After a referee has made his report, he has no power to alter it. The true remedy after the filing of the finding of facts accompanying the decision, which is the basis of the judgment, for any party prejudiced by the omission of the referee to find on any special and material facts,—a question as to which is raised by the evidence,—is to apply to the court in which the cause is tried, to call upon the referee to amend his findings of fact by adding his determination of such question. In most cases this is unnecessary, by the presumption that every material and controverted question of fact has been found by the referee in favor of the successful party. *N. Y. Superior Ct.*, *Sp. T.*, 1862, *Niles a. Price*, 23 *How. Pr.*, 473.

REMOVAL OF CAUSES.

10. Where on appeal from the determination of three referees, the case was settled by two of the referees in the absence of the third, and without notice to him,—*Held*, irregular, and that the case must be sent back for resettlement. *N. Y. Superior Ct., Chambers*, 1862, *Fielden a. Lahens, Ante*, 48.
11. A referee appointed to take evidence should take all that is offered, and leave it to the court, on the hearing of the matter, to determine what is not competent. *Supreme Ct., Chambers*, 1861, *Scott a. Williams, Ante*, 70.
12. An application by a party for a stay of the examination and proceedings in supplementary proceedings on the ground of ill health of the plaintiff, should be made to the referee, and not to the judge who made the order appointing the referee. *Supreme Ct., Sp. T.*, 1862, *Mason a. Lee*, 23 *How. Pr.*, 466.
13. Ill health or extreme mental excitement, is good ground for postponing the examination. *Ib.*

APPEAL, 14, 17; EXECUTORS AND ADMINISTRATORS, 5; HIGHWAYS, 4, 5.

RELEASE.

- A judgment-creditor cannot impeach a release, by the debtor, of a mere contingent obligation. *N. Y. Superior Ct., Sp. T.*, 1861, *McGay a. Keilback, Ante*, 142.

RELIGIOUS CORPORATION.

- It is no objection to an application by the vestry or trustees of a religious corporation for leave to sell or mortgage its real estate, that such application is not authorized by an express vote of the corporators, where neither the good faith of the application, nor the propriety of the proposed disposition, is questioned. *Supreme Ct., Sp. T.*, 1862, *Matter of St. Ann's Church, Ante*, 424.

PARTIES, 7, 8.

REMOVAL OF CAUSES.

1. An action to recover damages, for failing properly to present and protest a promissory note, is an action brought to recover on a chose in action, within the meaning of the act of Congress, of September 24, 1789,—which provides for the removal of causes from the State to the Federal courts, except where the action is to recover the contents of

SECURITY FOR COSTS.

- any promissory note or other chose in action. *Supreme Ct.*, 1862, *Anderson v. Manufacturers' Bank*, *Ante*, 436.
2. Where the right of the defendant to remove a case into the U. S. Circuit Court is extremely doubtful, the State court should not exercise its power of removal. *Ib.*
 3. Thus, where the action was by an assignee of the cause of action, suing in his own name, as required by the practice in the State court, and the assignor, whose name must, if the cause were transferred to the United States court, be substituted as plaintiff, was a citizen of the same State as the defendant;—*Held*, that the motion to remove should be denied. *Ib.*

REPLEVIN.

The action of replevin, in all except its form, and the additional provisional remedy provided by the Code (§ 211), remains where it was left by the Revised Statutes, and the rights arising incidentally under it must be regarded as continuing unrepealed by the Code. *N. Y. Superior Ct., Chambers*, 1862, *Porter v. Willet*, *Ante*, 319.

RULES.

MISNOMER.

SECURITY FOR COSTS.

1. In an action to recover judgment for the possession of personal property, where the plaintiff had filed an undertaking in the form prescribed in § 209 of the Code, to obtain the immediate delivery of the property, and the defendant was a non-resident;—*Held*, that under 2 Rev. Stat., 620, § 4, the defendant was entitled to have, in addition to the undertaking, security for costs, in the form of a bond, in the penalty of \$250. *N. Y. Superior Ct.*, 1861, *Boucher v. Pia*, *Ante*, 1.
2. When a foreign corporation commences an action for the recovery of the possession of personal property, the undertaking under § 209 of the Code; given in proceeds of claim and delivery on the commencement of an action, since it contains a provision which covers any judgment for costs which the defendant may obtain, substantially complies with the statute requiring a bond for costs in actions by foreign corporations. *Supreme Ct., Sp. T.*, 1862, *Wisconsin Marine & Fire Ins. Co. Bank v. Hobbs*, 23 *How. Pr.*, 494.

FOREIGN CORPORATION; UNDERTAKING, 2.

SET-OFF.

SERVICE.

1. Life and health insurance companies or associations, dealing in this State, must appoint an attorney in this State, on whom process can be served. *Laws of 1853*, 887, ch. 463, § 14; as amended, *Laws of 1862*, 506, ch. 300, § 4.
2. Foreign fire insurance companies, associations, or partnerships, must appoint an attorney in this State, on whom process can be served. *Laws of 1862*, 616, ch. 367, § 5; amending *Laws of 1853*, 904, ch. 466, § 23.
3. Where an order of publication of the summons is made for six weeks, once in each week, the service is not complete until the expiration of the six weeks,—*i. e.*, forty-two days. Publication six times in as many successive weeks, is not alone enough. The plaintiff cannot enter judgment until twenty days after the expiration of six full weeks, or forty-two days, when the service is completed. *Supreme Ct.*, 1861, *Richardson v. Bates*, 23 *How. Pr.*, 516.
4. In order to bring a person into contempt for disobedience of an order of the court which has been entered with the clerk, delivery of a copy of the order, showing at the same time a copy certified by the clerk, is a sufficient service. *Supreme Ct., Chambers*, 1862, *Smith v. Smith*, *Ante*, 130.

WITNESS, 13.

SESSIONS.

COURTS OF SESSIONS.

SET-OFF.

1. In cases of cross-indebtedness arising out of mutual dealings, either party is entitled, upon a liquidated debt to him becoming due, to have it set off against debts which he owes to the other party. *N. Y. Com. Pl.*, *Sp. T.*, 1862, *Schieffelin v. Hawkins*, *Ante*, 112.
2. This right may be enforced against an assignee for the benefit of creditors, if the contract creating the debt had been executed, so that the assignor's liability had been fixed before the assignment was executed. *Ib.*
3. A firm made an assignment for the benefit of creditors, and one of the partners made a like assignment for the benefit of his individual creditors, both giving preferences. The latter assignee being in possession of some real property belonging to the firm, the assignee of the firm brought an equitable action to have the title adjudged in him, and to obtain possession of the proceeds. The assignee of the individual claimed to set off a debt due from the firm to his assignor.

SHERIFF.

Held, that such set-off could not be allowed, and that the latter assignee must come in among the general creditors of the firm. *Supreme Ct.*, 1861, *Kendall v. Rider*, 35 *Barb.*, 100.

CAUSE OF ACTION, 8 ; DEMAND, 3.

SHERIFF.

1. A sheriff who levies upon goods under an execution as the property of the defendant therein, may, when he discovers that the goods belong to another, relinquish the levy and return his execution *nulla bona*. The only consequence of this act to the sheriff is the burden of showing property in the goods out of the defendant in the execution, should the good faith of his return be put in controversy. It does not alter the sheriff's liability or add to the burden he thus assumes, by showing that he has actually sold the goods under another execution, as the property of the same defendant. *Supreme Ct.*, 1862, *Blivin v. Bleakley*, 23 *How. Pr.*, 124.
2. The possession of a deputy sheriff, of property seized by him under an execution, is the possession of the sheriff, of whom he is a bare agent [2 *N. Y.*, 126 ; 7 *Ib.*, 453 ; 16 *Wend.*, 350], and not a bailee. He cannot therefore sue in his own name for such property, when wrongfully taken from him. The action must be brought by the sheriff. *Supreme Ct.*, 1862, *Terwilliger v. Wheeler*, 35 *Barb.*, 620.
3. In an action against the sheriff, for a false return of *nulla bona*, the sheriff is not estopped from showing property in the goods out of the defendant in the execution, by the fact that he had previously sold the property on a prior execution against the defendant, and paid over the surplus moneys to the purchaser at the sale, who claimed the property also by virtue of a bill of sale from the defendant. *Supreme Ct.*, 1862, *Blivin v. Bleakley*, 23 *How. Pr.*, 124.
4. An agreement by an under-sheriff with the bidders at a sheriff's sale, to warrant the title to the property,—*Held*, void. Such an agreement has no consideration but to increase the fees, and is therefore void, as against public policy. *Supreme Ct.*, 1862, *Ball v. Pratt*, 36 *Barb.*, 402.
5. After the sheriff has become liable for an escape in taking an insufficient bond from a prisoner in contempt, the prosecutor took an assignment of the bond after breach of its condition, and also took an order for a further attachment, but failed to issue such further attachment, and the prisoner was surrendered by his bail.

Held, a waiver of the prosecutor's right of action against the sheriff. *Supreme Ct.*, 1862, *Morton v. Campbell*, *Ante*, 410.

STAY OF PROCEEDINGS.

6. Sheriff's fees on warrant of county treasurer against defaulting collector, to be the same as on executions. *Laws of 1862*, 366, ch. 194.

ASSIGNABILITY OF CAUSE OF ACTION, 2; ATTORNEY, 9; ESCAPE.

SHIPPING.

Act to provide for the collection of demands against ships and vessels. *Laws of 1862*, 956, ch. 482; repealing 2 *Rev. Stat.*, 493, tit. 8, art. 1; and all the acts amending the same, and the *Laws of 1831*, ch. 318.

SLANDER.

EVIDENCE, 34.

SPECIFIC PERFORMANCE.

1. A court of equity can compel the specific performance of an absolute covenant to renew a lease at a rent to be fixed by arbitrators. *Supreme Ct.*, 1861, *Johnson a. Conger*, *Ante*, 195.
2. If the defendant in such case declines to submit to arbitration, the court will fix the rent, or direct a renewal at the former rate. *Ib.*

STATUTES.

1. A statute, which by its terms is to go into effect immediately, is operative from the instant of its final passage. *Supreme Ct.*, *Sp. T.*, 1862, *Fairchild a. Gwynne*, *Ante*, 121.
2. An affirmative statute does not take away the common law. *Ib.*
3. A general repeal of so much of prior statutes as is inconsistent with the repealing law, does not repeal acts which are inconsistent only with such portions of the repealing law as are unconstitutional, inasmuch as it is in so far no law. [26 *Ala.*, 165.] *Supreme Ct.*, 1861, *Devoy a. Mayor, &c.*, of N. Y., 35 *Barb.*, 264.
4. On the repeal of a statute which repeals or modifies a previous statute or rule, the latter is revived without formal words. *Supreme Ct.*, *Chambers*, 1862, *Sarsfield a. Van Vaughner*,* *Ante*, 297.

SUPERVISORS, 1.

STAY OF PROCEEDINGS.

RECEIVER, 5; REFERENCE, 12.

* This case was reversed on appeal, which will be reported in our next volume.

SUMMARY PROCEEDINGS.

STENOGRAPHER'S FEES.

Costs, 13, 14.

STOCKHOLDER.

It is a good defence to an action by a creditor of a corporation, to recover the amount of his debt from a stockholder under a statute provision making stockholders jointly and severally liable in case of a deficiency in the cash capital, that such creditor himself, at the time of acquiring his demand against the corporation, was a stockholder therein. *N. Y. Com. Pl., Sp. T., 1862, Wait v. Ferguson, Ante, 379.*

SUBROGATION.

A person damnified by the acts of a wrongdoer has no right to be subrogated to an indemnity which the wrongdoer may have taken against liability arising from his wrongful act. *N. Y. Superior Ct., Sp. T., 1861, McGay v. Keilback, Ante, 142.*

SUMMARY PROCEEDINGS.

1. A wharf or pier, reclaimed from tide-water by embankment or by raising the bottom with stone, earth, or other material, is a tenement within the meaning of 2 Rev. Stat., 512,—which authorizes summary proceedings in favor of a landlord to recover the possession of houses, lands, or tenements. *Supreme Ct., 1862, People v. Kelsey, Ante, 372.*
2. Where the affidavit showed that the plaintiff was a grantee claiming under the defendant, and that the defendant had not given up possession, and alleged that defendant became a tenant at sufferance of the plaintiff, and that said tenancy was terminated by a notice of one month;—*Held*, that this was not sufficient; for here is no tenancy, but, on the contrary, it is shown that the defendant was in reality a grantor yet in possession. *Supreme Ct., 1862, People v. Simpson, Ante, 457.*
3. The case of *People v. Ulrich (2 Abbotts' Pr., 28)*, questioned. *Ib.*
4. Where a lease is given to A., to commence on the termination of a lease of the same premises to B., the former cannot proceed under the statute to dispossess the latter for holding over. The "assigns" referred to in the statute must be such as hold the entire estate of the landlord, in the term demised to the tenant against whom the pro-

SUMMONS.

ceeding is had. *N. Y. Com. Pl.*, 1862, *Imbert v. Hallock*, 23 *How. Pr.*, 456.

5. The provisions of 2 Rev. Stat.,—authorizing summary proceedings to recover possession of land,—made applicable to proceedings to remove a keeper of a county poor-house. Requisites of affidavit and proof in such cases. *Laws of 1862*, 500, ch. 298, § 1; amending *Laws of 1847*, 740, ch. 498.
6. An affidavit to found summary proceedings for the possession of land, is not sufficient to give the magistrate jurisdiction, unless it shows the existence of the conventional relation of landlord and tenant, created by agreement or recognized by the acts of the party in possession. *Supreme Ct.*, 1862, *People v. Simpson*, *Ante*, 457.
7. The position of 2 Rev. Stat., 514, § 86,—relating to the summoning, drawing, and attendance of jurors in summary proceedings to recover possession of land,—amended. *Laws of 1862*, 621, ch. 368.
8. In summary proceedings to recover possession of demised premises, it is not competent for the tenant to show a breach of the landlord's agreement to construct the premises in a proper manner. The tenant cannot withhold both the rent and the possession. *Supreme Ct.*, 1862, *People v. Kelsey*, *Ante*, 373.
9. *It seems*, that summary proceedings to recover possession of land can be restrained by injunction, only when they are used as means of fraud. *Supreme Ct., Sp. T.*, 1861, *Ward v. Kelsey*, *Ante*, 106.

CERTIORARI, 3; ESTOPPEL, 3.

SUMMONS.

1. The summons in the form prescribed by subdivision 1 of section 129 of the Code, is proper only where the action is upon contract, for the recovery of a sum of money as such, without calling upon the court to ascertain or adjudge any thing but the existence and terms of the contract by which it is due. *Supreme Ct., Sp. T.*, 1862, *Norton v. Cary*, *Ante*, 364.
2. In an action to recover both liquidated and unliquidated damages for breaches of contract, the summons should follow the second subdivision. *Ib.*
3. The summons, provided by section 375 of the Code, requiring one or more joint defendants not originally served with process, to show cause why they should not be bound by the judgment, should merely require such defendants to show cause within twenty days after its service.

SUPPLEMENTARY PROCEEDINGS.

But specifying a time and place does not vitiate. *Supreme Ct., Chambers*, 1862, *Townsend a. Newell*, *Ante*, 340.

DISTRICT COURTS OF NEW YORK ; SERVICE, 3.

SUPERVISORS.

1. An informal and irregular ballot of a board of supervisors before passing a resolution appointing two newspapers for the publication of the session laws in their county (*Laws of 1845*, 305), will not vitiate the appointment. The manner in which they shall execute the power is directory merely ; so that a deviation from the mode, or the omission to observe some of the regulations prescribed in the statute will not vitiate. *Supreme Ct.*, 1862, *People a. Supervisors of Kings*, 23 *How. Pr.*, 89.
2. After a board of supervisors has apportioned the taxes among the county towns, a mandamus may issue to compel them to issue warrants to the collectors of taxes. *Supreme Ct., Sp. T.*, 1861, *People a. Supervisors of Schenectady*, 35 *Barb.*, 408.

SUPPLEMENTARY PROCEEDINGS.

1. Any justice of the Supreme Court may make an order, under section 292 of the Code, for the examination of a judgment-debtor, without regard to the residence or location of the justice. But the debtor must be directed to appear in the particular county prescribed in that section. *Supreme Ct.*, 1862, *Bingham a. Disbrow*, *Ante*, 251.
2. In proceedings supplementary to execution, under section 292 of the Code, the creditor may examine the judgment-debtor, and any other person, fully in regard to the circumstances attending the transfer and disposition of his property. Where witnesses examined claim to own property transferred to them by the judgment-debtor, the creditor may require them to answer in respect to the transfer. He is entitled to a discovery as to its good faith or its fraudulent character. *Supreme Ct.*, 1862, *Clapp a. Lathrop*, 23 *How. Pr.*, 423 ; disapproving *Van Wyck a. Bradley*, 3 *Code R.*, 157 ; *Town a. Safeguard Ins. Co.*, 4 *Bow.*, 683.
3. The portion of section 292 of the Code, which provides for the examination of a judgment-debtor, when an execution issued to the sheriff of the county where he resides has been returned unsatisfied, refers to the county where he resides at the issuing of the execution. *Supreme Ct.*, 1862, *Bingham a. Disbrow*, *Ante*, 251.
4. In all cases where an application is made under section 294 of the

TRIAL.

Code, notice of the proceeding should be given to the judgment-debtor. *Supreme Ct.*, 1862, Gibson *a.* Haggarty, 23 *How. Pr.*, 260.

5. A stranger to the action, who has a lien upon a fund sought to be reached by supplementary proceedings, is not entitled to notice of the proceedings, or to be made a party thereto. *Supreme Ct., Chambers*, 1862, Corning *a.* Glenville Woollen Co., *Ante*, 339.
6. The title of a *bona-fide* assignee of a judgment-debtor's property, cannot be affected by an order under section 294 of the Code, made subsequent to the assignment, where the assignee has had no notice of the proceedings. *Supreme Ct.*, 1862, Gibson *a.* Haggarty, 23 *How. Pr.*, 260.

CONTEMPT 3, 4; RECEIVER, 3, 4; REFERENCE, 12.

SUPREME COURT.

PRECEDENT.

SURPLUS MONEYS.

JUDICIAL SALE, 8.

SURROGATE'S COURT.

APPEAL, 24, 25.

TRESPASS.

CAUSE OF ACTION, 4.

TRIAL.

1. Issue in proceedings to try the safety of buildings in the city of New York, to be tried without delay, giving precedence to the trial of such issue over all others. Powers of the court in respect thereto, and enforcing determination. *Laws of 1862*, 595, ch. 356, § 43.
2. The provision of the Revised Statutes (2 *Rev. Stat.*, 459, § 11),—which directs that every issue of fact or of law joined in an action founded on any evidence of debt against a corporation, shall have a preference on the trial and argument thereof in any court where the same may be pending,—is still in force. *Ct. of Appeals*, 1852, Brainerd *a.* N. Y. & Harlem R. R. Co., 23 *How. Pr.*, 491.
3. Where a conversation between persons is offered in evidence, it is the duty of the party offering it, to disclose how it may be material.

TRIAL.

Supreme Ct., 1862, First Baptist Church *a.* Brooklyn Fire Ins. Co., 23 *How. Pr.*, 448.

4. A witness was asked to state if the fence was sufficient to turn orderly cattle or not; and if not, why? The question was objected to as incompetent, immaterial, and leading.

Held, that the objection was not sufficient to raise, on appeal, the impropriety of calling for the witness's opinion. *Supreme Ct.*, 1862, Staats *a.* Hudson River R. R. Co., 23 *How. Pr.*, 463.

5. Under the common general interrogatory, requiring a witness to state any thing known to him material to the issue, or to the benefit of the party interrogating, the witness may state a fact material to the issue, though to the detriment of such party. *Supreme Ct.*, 1860, Van Ness *a.* Bush, *Ante*, 33.
6. Wherever trial by jury is authorized, the presiding magistrate has power to charge the jury upon the law of the cause. *Supreme Ct.*, 1862, People *a.* Kelsey, *Ante*, 373.
7. Where a charge to the jury is susceptible of two constructions, the one warranted by the case, the other erroneous, a party cannot take advantage of his exception, without presenting the modification necessary to free the charge from ambiguity. *Supreme Ct.*, 1862, Springstead *a.* Lawson, *Ante*, 328.
8. Where, in an action for damages caused by a railroad collision, the defendants requested the court to charge "that if the negligence of the deceased in any way contributed to cause the collision which resulted in his death, the plaintiff could not recover,"—*Held*, that this request gave in precise words the true legal rule of the case, and the defendants were entitled to have it given to the jury substantially, as it was asked, without qualification, or to have it plainly refused. Adding, against defendant's objection, the words "it being understood that this negligence is the want of such care as a person of ordinary prudence would exercise in like circumstances," is error. *Ct. of Appeals*, 1862, Wilds *a.* Hudson River R. R. Co., 23 *How. Pr.*, 492; reversing S. C., 33 *Barb.*, 503.
9. A further request to charge that if the deceased was aware of the approach of the train in time to have stopped before reaching the track upon which the train was approaching, and intentionally drove upon the track after being aware of the train, the plaintiff cannot recover,—is proper and should be complied with. *Ib.*
10. So of a request to charge that the deceased cannot, by his own negligence, cast upon the defendants the necessity of exercising extraordinary care. *Ib.*
11. A judge is not bound to adopt the precise verbiage of a request to

UNDERTAKING.

charge the jury ; it is sufficient if in effect he charges in accordance with the request. *Supreme Ct.*, 1862, *First Baptist Church v. Brooklyn Fire Ins. Co.*, 23 *How. Pr.*, 448.

12. After impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it bad, the question of credit is then for the jury, under proper comments from the court, without any inquiry of the discrediting witness as to whether they would believe him under oath. The jury ought not to be excluded from drawing the fair and reasonable inferences from the evidence. *Supreme Ct.*, 1862, *Wright v. Paige*, 36 *Barb.*, 438.

CAUSE OF ACTION, 6 ; EVIDENCE ; EXCEPTIONS ; INDICTMENT ; JUSTICES' COURTS ; QUESTIONS OF LAW AND FACT ; REFERENCE ; VARIANCE ; VERDICT.

TRIBUNAL OF CONCILIATION.

A tribunal of conciliation, with powers and jurisdiction of Supreme Court, established in the Sixth Judicial District, including the county of Sullivan. *Laws of 1862*, 812, ch. 451.

UNDERTAKING.

1. If the sureties proposed in an undertaking given on an appeal to the Court of Appeals, fail to justify when excepted to by the respondent, the appeal becomes a nullity. *Supreme Ct.*, 1862, *Kelsey v. Campbell*, *Ante*, 368.
2. Where a non-resident plaintiff has given security for costs, under 2 *Rev. Stat.*, 620, § 4, and the sureties become insolvent, the court has no authority to require new or further security to be given. *N. Y. Superior Ct., Chambers*, 1862, *Boucher v. Pia*, *Ante*, 1.
3. In an action upon an instrument in the form of the undertaking required by the Code (§§ 240, 241) to be given on the discharge of an attachment reciting the commencement of an action, the issuing of the attachment, and the making of application for its discharge,—*Held*, that the subscribers to the undertaking should not be allowed to show that the recitals were untrue. *N. Y. Com. Pl.*, 1861, *Coleman v. Bean*, *Ante*, 38.
4. The plaintiff is not at liberty to deny, in an action on his undertaking to obtain the delivery of property, that he made the affidavit which it is therein recited that he did make, although the affidavit be in fact made by another. *Supreme Ct., Sp. T.*, 1862, *Wisconsin Marine & Fire Ins. Co. Bank v. Hobbs*, 23 *How. Pr.*, 494.

ESTOPPEL, 2 ; MARRIED WOMAN, 5 ; SECURITY FOR COSTS.

VERDICT.

USURY.

In a foreclosure to which the defence of usury is interposed by a grantee of the mortgagee, an admission that such grantee is the owner of the premises, imports that the conveyance by which the grantee acquired title was in hostility to the mortgage. *N. Y. Superior Ct.*, 1862, Chamberlain *a.* Dempsey, *Ante*, 241.

DEFENCES, 4.

VARIANCE.

1. When it appears that the party was not and could not have been misled, a variance between the complaint and the proof may be disregarded without amendment. [11 *N. Y.*, 368; 21 *Ib.*, 238; 1 *Duer*, 209.] *Supreme Ct.*, 1862, Craig *a.* Ward, 36 *Barb.*, 377.
2. A technical release pleaded,—a release by estoppel merely, proved. *Held*, no material variance. *Supreme Ct.*, 1861, Cornell *a.* Masten, 35 *Barb.*, 157.

AMENDMENT, 6, 8.

VERDICT.

1. Where several special issues are submitted to a jury, who, under instructions of the court, render a general verdict, such verdict is equivalent to finding each of the issues in favor of the party in whose behalf the general verdict is found. *Supreme Ct.*, 1862, People *a.* Board of Police, *Ante*, 151.
2. A jury found that A. did not withdraw from a certain office, because, as their finding stated, he had never accepted, and therefore could not withdraw from, the office.
Held, that it appearing from other facts, as matter of law, that A. had accepted the office, the finding of the jury was to be treated as simply a verdict that he did not withdraw therefrom. *Supreme Ct.*, 1861, People *on rel.* Gorman *a.* Board of Police, &c., 35 *Barb.*, 527.
3. On an application for a mandamus to restore the relator to the office of policeman in the Metropolitan Police District, a jury, by whom the issues of fact were tried, found that the relator had refused to take or hold the office.

Held, that this finding was not sufficiently definite to establish a defence, and that the defendant's pleading being equally indefinite, it should be construed against him, and the mandamus should issue. *Ib.*

VERIFICATION.

4. A finding that the relator has, since his appointment to office, entered into other employments unconnected with the police, from which he has derived large profits, is in like manner insufficient to establish a defence. *Ib.*
5. So, where it is found in general terms that such employment was inconsistent with the duties of a policeman. The facts establishing such inconsistency should be found. *Supreme Ct.*, 1861, *People on rel. Titus v. Board of Police, &c.*, 35 *Barb.*, 535.
6. Where a plea of tender was interposed, and money paid into court, and the jury found the tender sufficient; and under instructions from the court, rendered a verdict for the plaintiff for the amount paid into court;—*Held*, that a motion to correct the verdict, and to enter judgment for the defendant, could be heard only on a case made. *N. Y. Superior Ct., Chambers*, 1862, *Brush v. Kohn, Ante*, 51.
7. Where there is no conflicting evidence upon an issue before a jury, or the weight of evidence in favor of one party is so decided that the court would set aside an adverse verdict as against evidence, it is the duty of the judge to direct the jury what verdict to render. *Supreme Ct.*, 1862, *People v. Board of Police, Ante*, 158.
8. A verdict found under the instruction of the court will be deemed rightly rendered in the absence of evidence to the contrary. *Ib.*
9. The court can only review the findings of the jury on the facts, or set aside the same as against the weight of evidence, where there is no evidence to sustain the verdict, or it is against the clear and decided weight of the evidence. [3 *Hill*, 250; 7 *Barb.*, 271; 27 *Ib.*, 528.] *Supreme Ct.*, 1861, *Smith v. Tiffany*, 36 *Barb.*, 23.
10. In an action to recover damages for loss of personal property by a fire, the evidence was that the defendant, shortly before the fire broke out, rightfully went into a chamber of the house, where the property was, with a lighted candle; and that the defendant had stated that he thought the house must have taken fire from the candle, the circumstances showing that the fire might have had a different origin. *Held*, that the verdict was against evidence. *Supreme Ct.*, 1860, *Lansing v. Stone, Ante*, 199.

AMENDMENT, 4; MANDAMUS, 8, 9.

VERIFICATION.

1. An attorney having possession of a written instrument for the payment of money only, on which action is brought, may verify the complaint, whether the plaintiff be within the same county or not. *Supreme Ct., Chambers*, 1862, *Wheeler v. Chesley, Ante*, 441.

WILLS.

2. The possession of the instrument, with information derived from the plaintiff, are sufficient grounds of knowledge and sources of belief. *Ib.*
3. In all cases of verification by the attorney, he must state his knowledge or grounds of belief. *Supreme Ct., Chambers, 1862, Soutter a. Mather, Ante, 440.*

WAIVER.

1. A waiver, by the party for whose benefit or protection notice should be given, is equivalent to notice, and dispenses with its necessity. *Supreme Ct., 1862, People a. Albright, Ante, 305.*
2. *It seems,* that a delay of eight years in the prosecution of his suit will be deemed an abandonment or waiver by plaintiff of his prior right, by the commencement of his suit, as against a subsequently prosecuting debtor. *Myrick a. Selden, 36 Barb., 15.*

AMENDMENT, 1; CLAIM AND DELIVERY; MOTIONS AND ORDERS, 5; SHERIFF, 5.

WARRANTY.

A mere cold, controllable by ordinary remedies, not affecting the general health or usefulness of a horse, is not an unsoundness. *Supreme Ct., 1862, Springsteed a. Lawson, Ante, 328.*

WHARFAGE.

Mode of proceeding to collect wharfage of vessels in New York and Brooklyn, established by the Laws of 1860, 416, ch. 254, is hereafter to be according to section 117 of act of 1813. *Laws of 1862, 952, ch. 479.*

WILLS.

The provisions of 2 Rev. Stat., 68, § 74,—providing for the proof of wills, as lost or destroyed wills,—prescribes one common and invariable rule as to the validity or effect of lost wills. 1. That the loss or destruction must have occurred after the death of the testator, unless it happened fraudulently in his lifetime; and 2. That the contents must be clearly and distinctly established by two credible witnesses—a copy or draft being equivalent to one witness. These prerequisites are indispensable in the proof, in any tribunal, for any purpose, of wills alleged to have been lost or destroyed. *Supreme Ct., 1861, Harris a. Harris, 36 Barb., 88.*

FORMER ADJUDICATION, 7.

WITNESS.

WITNESS.

1. A relator suing in the name of the People for a writ of mandamus, is a competent witness in behalf of the plaintiffs, under § 471 of the Code. *Supreme Ct.*, 1862, *People v. Albright*, *Ante*, 305.
2. No testimony or evidence given by any person in any civil action, nor any evidence or testimony derived from the books or papers of such party or witness, produced by him as a witness, or otherwise, in such action, can be used in any criminal prosecution against such party or witness, under any of the provisions of this act (Act to prevent and punish fraud in the use of false stamps, brands, labels, or trade-marks). *Laws of 1862*, 515, ch. 306, § 6; repealing *Laws of 1845*, 305, ch. 279; 1850, 197, ch. 123.
3. A statement made to an attorney, to be privileged, must be one made for the purpose of obtaining professional advice on the subject of such statement. If it has no reference to the professional employment, it falls within the exception to the rule of exclusion, although made while the relation of attorney and client exists. [1 *Greenl. Ev.*, § 244; 1 *Phil. Ev.*, 145; 2 *Starkie Ev.*, 230.] *Supreme Ct.*, 1862, *Marsh v. Howe*, 36 *Barb.*, 649.
4. Thus, a statement made by a client to his attorney, two and a half years after the latter had obtained a judgment in favor of the former, and several months after it had been assigned by the plaintiff therein to another, as to the payment of that judgment,—*Held*, not a privileged communication, the relation of attorney and client in respect to the action in which that judgment was obtained being at an end. *Ib.*
5. It makes no difference, that at the time the statement was made, the relation existed between the parties in another matter, and that they had just before been in consultation in respect to such other matter. *Ib.*
6. No notice of the examination of an assignor necessary, under the Code of 1857. [Code, § 399; 13 *N. Y.*, 248; 16 *Ib.*, 263.] *Supreme Ct.*, 1860, *Seymour v. Bradfield*, 35 *Barb.*, 49.
7. Evidence of the declarations of a witness is inadmissible to contradict him, until he has been afforded an opportunity to explain them. This rule applies to witnesses examined by commission, as well as to others. *Supreme Ct.*, 1860, *Van Ness v. Bush*, *Ante*, 33.
8. Where, on cross-examination, a party takes the testimony of the witness to new and collateral matter not pertinent to the issue, he is not at liberty to give evidence to contradict the witness in this respect. *Supreme Ct.*, 1862, *Cronnse v. Fitch*, *Ante*, 347.
9. Testimony cannot be offered for the purpose of contradicting a witness where the attention of the witness has not been called to the sub-

WITNESS.

ject in regard to which he is proposed to be contradicted. *Supreme Ct.*, 1862, First Baptist Church *a.* Brooklyn Fire Ins. Co., 23 *How. Pr.*, 448.

10. Every witness, a party as well as any other, must be allowed to show that he was mistaken in previous admissions or statements which are used to discredit him. *Supreme Ct.*, 1860, Van Ness *a.* Bush, *Ante*, 33.
11. Where a witness gives testimony upon behalf of the plaintiff, and in reference to a matter about which no inquiry has been made by the defendant, the plaintiff cannot be allowed to call witnesses to contradict him. *Supreme Ct.*, 1862, First Baptist Church *a.* Brooklyn Fire Ins. Co., 23 *How. Pr.*, 448.
12. It is proper to prove by the cross-examination of a party offering himself as a witness on his own motion, any facts that impeach his evidence. *Supreme Ct.*, 1862, Springstead *a.* Lawson, *Ante*, 328.
13. A non-resident witness who comes to attend a court of this State, is privileged while going and coming not only from arrest, but from the commencement of an action against him. Non-resident witnesses cannot be reached by the process of the courts, and their attendance must therefore be voluntary; but if, while so attending, the courts allow them to be subject to actions to be commenced in the courts of this State, and thus subjected to the necessity of remaining or returning to litigate suits in a foreign forum, a most serious obstacle is interposed to their voluntary attendance.

So held, of a party attending as a witness on his own behalf. *Supreme Ct.*, 1862, Merrill *a.* George, 23 *How. Pr.*, 331.

EVIDENCE, 14-17; PARTIES, 1; SUPPLEMENTARY PROCEEDINGS, 2;
TRIAL, 3-5, 12.

THE END.



UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 166 428 1

